United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

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EXCERPTS FROM PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS RULE 37 MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff, -against- AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.	69 Civ. 5740 (M.E.L.)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS RULE 37 MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

August 25, 1972

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff, -against- AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.	69 Civ. 5740 (M.E.L.)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS RULE 37 MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

Preliminary Statement

This memorandum is submitted in support of plaintiff's motion, pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, for an order (1) directing defendant American Society of Composers, Authors and Publishers ("ASCAP") to answer fully and responsively certain interrogatories inadequately answered, (2) overruling ASCAP's objections to certain other of plaintiff's interrogatories and directing prompt answers to them, and (3) overruling ASCAP's objections to plaintiff's requests for production of documents and directing ASCAP promptly to permit inspection and copying in accordance with those requests.

Nature of the Action

This is a class action for injunctive relief brought under Sections 1 and 2 of the Sherman Act and Section 16 of the Clayton Act. The thrust of the complaint is that defendants--the two music performance rights licensing organizations, ASCAP and Broadcast Music, Inc. ("BMI"), as well as their publisher and writer members--have monopolized relevant music markets, have eliminated price competition amongst themselves and have therefore denied plaintiff access to a competitive market.

Defendants have achieved this extraordinary result--the total elimination of price competition among more than 45,000 suppliers--by two basic means (among others).

First, virtually all publishers and writers in the United States have designated either ASCAP or BMI as the common licensing agent for performance rights to their music. In other words, they have created two enormous copyright pools (ASCAP's alone is believed to consist of more than three million compositions).*

Second, both licensing organizations, which wield the leverage of these pools, refuse to issue any license to

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* Additionally, ASCAP and BMI each has agreements with more than 30 foreign licensing organizations, authorizing them to license in the United States the works of hundreds of thousands of foreign publishers and writers, consisting of millions of compositions protected by copyright abroad.

any user of music except on a blanket basis--i.e., a license to the entire pool at a fixed rate which does not vary in amount with the nature or extent of the pool music used by the licensee; and which is not reduced if the licensee obtains any direct licenses to the music it uses from the writer or publisher members of the pools.* In short, the licensee cannot buy in a competitive market without paying twice for the same rights and is therefore, as a matter of economic reality, foreclosed from that market.

The result, then, of the pools' insistence on this blanket arrangement is that the licensee pays each pool a fixed price (since a common agent's setting of a price for thousands of principals is obviously price-fixing) and is subjected to two forms of "tying": (1) accepting and paying for a license to millions of musical compositions he knows he

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* ASCAP and BMI also purport to offer broadcasters a so-called per-program license which, in reality, is a blanket license at a higher rate. Under an ASCAP per-program license, for example, the licensee pays a fee of 9% of the "time income" attributable to any program using any bar of ASCAP music (as opposed to roughly 2% of total annual time income which is the going blanket license rate). Since the vast preponderance of programs use some ASCAP music which cannot, as a practical matter, be licensed directly from its proprietors, the only practical difference between the two forms of license is that the per-program arrangement will effectively generate larger fees. Doubtless, for that reason, no television station or network in the United States holds an ASCAP per-program license; all have accepted the blanket arrangement.

will have no occasion to use, as a condition to receiving rights to the hundreds of thousands of musical compositions as to which such occasion may arise (the "wanted/unwanted music tie"); and (2) paying the pools for music which he could feasibly license directly at competitive prices, as a condition to receiving rights to music which, as a practical matter, would not be accessible directly from the compositions' suppliers (the "accessible/inaccessible music tie").

Short of more drastic remedies, the best way to vitiate these ties and to restore price competition to this market would be to compel the pools to license their music on a per-use basis--e.g., a license under which plaintiff would pay a fee for the right of access to a limited portion of each pool plus a specified use fee for each performance of pool music not licensed directly from its proprietors (the amount of which fee would vary depending upon the nature of the use). This is the principal relief which plaintiff seeks in this action.

Put another way, plaintiff is willing to pay the pools a fee for the right to enter their "supermarkets", but wants thereafter to pay only for the "goods" which plaintiff actually buys.

ASCAP, the only defendant with which this motion

is concerned, will apparently defend its insistence upon the blanket arrangement by claiming that (1) plaintiff can avoid the restraints of a blanket license by licensing all of its needs directly and thus by-passing ASCAP entirely (the so-called "by-pass" alternative); (2) a per-use license would be unfeasible for ASCAP to administer; and (3) the restraints imposed by blanket licenses are otherwise justified under a "rule of reason" test because ASCAP's purposes in imposing them are benevolent.

Thus, plaintiff will show that the "by-pass" alternative is unrealistic (in fact, to attempt it would cause plaintiff an immediate competitive injury and, in the long range, considerably worse); that the per-use arrangement is perfectly feasible to administer; and that ASCAP is motivated, in denying that license, by the specific intent to monopolize this market and render it free from any semblance of price competition. Moreover, in the light of the Court's decision denying ASCAP's motion for summary judgment, plaintiff will further show that the market for the licensing of performance rights to television networks will not only function under a per-use system, but will generate price competition to a significant degree. Furthermore, plaintiff will prove that ASCAP has both attempted to monopolize relevant music markets and has succeeded in that design.

To establish these propositions as well as the existence of the ASCAP practices and purposes described above is the main objective of the document requests and interrogatories which form the subject of this motion.

Status of Discovery

Plaintiff served interrogatories addressed to ASCAP on March 18, 1970. Partial answers thereto were served on June 30, 1970; additional answers were served on October 21, 1970. On October 21, 1970, ASCAP also served its objections to the unanswered interrogatories.*

On October 15, 1971, plaintiff served its Rule 34 request on ASCAP. Thereafter, discovery was stayed at the request of the Court, pending decision on ASCAP's summary judgment motion and BMI's motion for severance of various issues and an effort to stipulate facts. ASCAP filed its objections to the Rule 34 request on July 11, 1972. Its failure to produce documents pursuant to requests which were not objected to (despite repeated assurances and even representations to the Court that it would do so) is the subject of another, pending Rule 37 motion.

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* BMI was served with interrogatories virtually identical to those addressed to ASCAP on March 18, 1970. BMI served partial answers on February 19, 1971, and March 26, 1971. BMI has stipulated to abide by the Court's ruling on the present motion, which is directed only to ASCAP.



accounting basis.

ASCAP's usual token objections are typically deficient and should be overruled.

E. General Document Categories

1. Board and committee materials, advertising and promotional materials, publications, and communications with members (DR's A3-7, 11, B6-8, 13)

These requests are discussed together because, while they may have relevance to differing subjects, they are identical in at least one respect: all call for categories of documents which are limited by their nature (with certain specific exceptions discussed below) to topics which are necessarily pertinent to the subject matter of this action.

This is a large and complex lawsuit. It charges restraints of trade which, while blatant in their overall effects, entail proof of literally hundreds of discrete factual propositions, including numerous relatively subtle points of motivation and intent and their specific, historical manifestations. It also charges the monopolization of relevant music markets which in and of itself is a lawsuit of considerable proportion requiring an examination into every aspect of ASCAP's business.

No doubt, we could have prepared a list of all the specific relevant subjects as to which we sought Board

of Directors' minutes or advertising materials, and that list would have been as long as this memorandum. The result would have been "make-work" for all counsel. For, while cross-referencing such a list against the documents in question would have substantially enlarged the time required to compile and produce them, the possibility that it would have reduced the number of documents actually produced is exceedingly remote.

ASCAP, as mentioned above, is a single-line "company". It has, basically, six functions: administrative (including financial); licensing; monitoring and policing uses (including the institution of infringement litigation); distribution of revenues (including the payment of advances to certain members); general membership relations (including functions with respect to prospective members); and public relations (including lobbying activities). From the foregoing discussions it should be apparent that every one of those functions is material to this case and that the documents sought here are necessarily encompassed within those functions.

With respect to Board and committee materials, for example (DR's A-3 and 4), one need only look at the Index to ASCAP's Articles of Association to determine the sorts of matters that come to Board and committee attention



UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

-against-

AMERIC[illegible]CIETY OF COMPOSERS, AUTHO[illegible] PUBLISHERS, et al.,

Defendants.

69 Civ. 5740 (M.E.L.)

ASCAP'S MEMORANDUM IN OPPOSITION TO CBS' MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

We submit this memorandum in opposition to CBS' Rule 37 motion to compel answers to interrogatories and production of documents.

Preliminary Statement

The very bulk of the memorandum which CBS has submitted in support of its motion is perhaps the best demonstration of the improper burdensomeness of CBS' demands. No

court should be compelled to read a 100-page brief on a discovery motion. No party should be compelled to comply with demands so burdensome.

CBS' motion, coupled with its most recent deposition notice (the subject of a separate motion for a protective order by ASCAP), demonstrates, we submit, that CBS is interested in delaying the trial of this action well beyond February 26, 1973.

And, unless the Court now imposes some restraints on CBS' insatiable appetite for discovery, it is likely that the trial, whenever it takes place, will be an unmanageable enterprise both for the Court and counsel.

The CBS Discovery Demands

Our objection to the CBS discovery requests, as they are now framed, is simply that those demands are so broad, so burdensome and so unrelated in the main to any relevant issues in this lawsuit that they should be stricken in their entirety. To the extent that we have been able to discover in those demands, requests for pertinent material -- and to the extent that CBS may wish to reframe its requests to limit itself to pertinent material -- we have and we shall comply (see pp. 6-9 , infra).

CBS suggests that

"The subject of this action is the music licensing activities of ASCAP . . . ." (CBS Mem., p. 8)

In consequence, CBS says that

"Virtually every file in [ASCAP's] possession is relevant to the subject matter of this motion and is certainly likely to contain, or lead to the discovery of, relevant and admissible evidence." (CBS Mem., p. 10) (Emphasis in original)

And, contrary to CBS' assertions (CBS Mem., p. 10), the CBS demands are broad enough to call for the production of virtually every ASCAP file (as the footnote demonstrates).*

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* CBS' Rule 34 request is 16 pages long; it contains 50 separate paragraphs and numerous subparagraphs. Among other items, CBS seeks the following:

"Any minutes, drafts of minutes or notes regarding any meeting of the ASCAP Board of Directors or any ASCAP committee (including, without limitation any negotiating committee or subcommittee) [from January 1, 1960 to date].

* * *

"Any proposed, discussed, contemplated or published advertisement, brochure or pamphlet, prepared by, or at the request of, ASCAP or for ASCAP's consideration [from January 1, 1960 to date].

* * *

"Any document disseminated by, or at the request of, ASCAP to its general membership (not including distribution statements or checks) [from January 1, 1960 to date].

* * *

(continued)

The fact is, however, that the issues in this case and, hence, the proper scope of discovery are not nearly as broad as CBS contends. We are here principally concerned with the objective and undisputed activities of ASCAP operating under the aegis of the Amended Final Judgment, the legal consequences of those activities and

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(footnote, p. 3, continued)

> "Any statement made by any ASCAP employee or member as part of any speech, lecture, symposium or panel discussion or to any meeting of any organization (including, without limitation, ASCAP general meetings) [from January 1, 1960 to date].
>
> * * *
>
> "Any communication between ASCAP and any other person (including, but not limited to, any of its members) concerning ASCAP's compliance or noncompliance with any ASCAP consent decree or antitrust law or regarding this action [from January 1, 1960 to date].
>
> * * *
>
> "Any communication between ASCAP and any of its publisher members (not including distribution statements or checks) [from January 1, 1960 to date].
>
> * * *
>
> "Any communication between ASCAP and any of its writer members whose last names begin with any letter from A through H or whose credits have exceeded the current performance election maximum (not including distribution statements or checks) [from January 1, 1960 to date].

the prospective changes in the system urged by CBS.*

Virtually everything (if not everything) ASCAP does -- licensing, surveying users, commencing infringement actions in its members' behalf, distribution of revenues -- is a matter of public record and is constantly being reviewed and scrutinized by this Court and the Department of Justice.

If there ever were an organization which operated in a fishbowl, it is ASCAP. And, if there ever were an antitrust case, where secrecy and clandestine activities play no role, it is this case.

In these circumstances, it is perfectly plain, we submit, that the most important discovery to be had in this case is in the public records of this Court -- not in a wholesale, undifferentiated disclosure of every piece of paper in ASCAP's files.

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* CBS' memorandum contains a lengthy discussion of the merits of this lawsuit and CBS' contentions concerning the same. That discussion repeats what CBS has said many times before. We see no need, in response, to repeat what we have said many times before, except to note that our failure to respond is by no means acquiescence in CBS' discussion, including its misstatements of ASCAP's position in this case.

Discovery to Date

CBS' discovery to date is of more than passing interest. For the scope of that discovery demonstrates that far from frustrating CBS' efforts to obtain information, ASCAP, its employees and its members have gone to some length to accommodate CBS (even when there were serious questions concerning the appropriateness of the CBS demands).

Depositions

CBS has already conducted more than 24 days of depositions.

Among the witnesses deposed were: Herman Finkelstein, ASCAP's General Counsel (4 days); Paul Marks, ASCAP's Director of Operations (4-1/2 days); Paul Fagan, ASCAP's Chief Economist and Manager of Special Projects (3-1/2 days); Leon Brettler, an ASCAP Board member (2 days); Edwin H. Morris, an ASCAP Board member (2 days).

Among the subjects covered at the depositions at great length were: ASCAP's licensing activities, past and present; the ASCAP survey; the ASCAP distribution system; the technology of the ASCAP computer (not only what it does, but what it might be able to do); the organization

of ASCAP's files; ASCAP's internal management structure; the operations of the ASCAP Board and its various committees; the operations of various ASCAP departments; the music publishing business (past, present and future in all of its aspects, i.e., performance rights, sheet music, mechanical rights, motion picture licensing); what might happen under a system of "per use" or "clearance at the source" licensing; and many, many other subjects.

Answers to Interrogatories

ASCAP has answered most of CBS' more than 230 interrogatories.

The answers and exhibits annexed thereto are at least six inches thick.

Production of Documents

CBS served a series of Rule 34 requests on numerous ASCAP publishers seeking documents relating to negotiations with 3M.

Those documents numbering in the thousands were produced without objection. Thousands of additional documents were obtained from the 3M Company's witness.

As to CBS' Rule 34 request at issue here, ASCAP agreed to produce documents for the years 1965-1969 relating to the following subjects:

(1) Music performing rights licenses for broadcasters other than blanket or per-program licenses (including per-use, per-performance or per-piece licenses, licenses of broadcasters limited to locally originated programs or excluding from the royalty-payment base musical compositions cleared at the source, limited repertory licenses, and direct licenses from ASCAP members to users) and including requests by users for such licenses, responses by ASCAP to such requests, and consideration by ASCAP of any such requests or responses;

(2) The consequences, if any, to ASCAP members of licensing directly to broadcasters;

(3) The ability or inability of a broadcaster or group of broadcasters to license their requirements directly from ASCAP members;

(4) Possible modifications of the ASCAP consent decrees insofar as they concern non-exclusive [illegible] and insofar as they do not require ASCAP to grant any form of license to broadcasters other than a per-program license;

(5) Any agreement entered into, in the period 1965-1969, or any provision of any such agreement proposed, considered or discussed between ASCAP and any other domestic music licensing organization;

(6) Unsuccessful efforts by ASCAP to contact, or communicate with, any of its members;

(7) The licensing of motion picture producers by ASCAP;

(8) State statutes concerning per-piece or per-performance licensing of music;

(9) Station KBER in Texas.

Those documents have been produced.

Stipulated Facts

The stipulation of facts between ASCAP and CBS has 37 paragraphs and 20 annexed exhibits and schedules.

ARGUMENT

CBS' motion should be denied in its entirety -- not because of sheer bulk, but because no party to a litigation should have the right to say to an adverse party, "Give me everything in your files because somewhere I may find a relevant document."

If the discovery CBS has had so far is insufficient for its purposes, then the burden should be on CBS to specify and particularize the areas where additional discovery is required. It will not be easy, we submit, for CBS to meet that burden given the extent of the discovery it has already had.

We shall not write for 100 pages in opposition to each and every CBS argument concerning each and every CBS document request. Our object, rather, is to demonstrate to the Court why CBS should be denied any relief -- and, instead, instructed to draft a reasonable request

for documents bearing in mind what it already has discovered and also bearing in mind what the genuine factual issues are in this lawsuit.

General Objections

If CBS had simply served its document request without a preliminary set of definitions and instructions, the request would have been onerous. The definitions and instructions section of CBS' request emphasizes the impropriety of that document.

Outside Accountants and Attorneys

CBS' definition of ASCAP in its Rule 34 request covers ASCAP's outside accountants and attorneys.

There is no good reason -- and it would be unduly burdensome -- to compel ASCAP to go to all of these people (for example, outside counsel who handle infringement litigation all over the country) to locate all documents that may come within the scope of CBS' Rule 34 request. As CBS knows, ASCAP retains lawyers in nearly every state to prosecute routine infringement actions.

File Folder Production

CBS sought production of documents in their

original file folders or, in lieu thereof, any writing in the file folder from which the documents were taken.

We agreed to produce file folders if they contained writings which fell within the scope of a specific unobjected-to request. But we objected to the mass production of all file folders which contained any relevant document, a task that would unreasonably and unnecessarily disrupt ASCAP's affairs.

Surely, nothing more is required.

Privilege

In connection with any claim of attorney-client privilege, we agreed to supply CBS with the date of the privileged document, the names and addresses of the persons who prepared it, the names and addresses of the persons to whom it was circulated, the names and addresses of the persons now in possession of the document and the basis for the claim of privilege.

With the foregoing information, CBS will certainly be in a position to decide whether to contest the claim of privilege.

ASCAP should not be required to disclose the purpose for which the document was written, a disclosure

which in many instances might itself violate the privilege.

Sufficiency of Designation

Not content with its unlimited description of categories of documents, CBS also seeks documents which contain "any reference to, reflect or relate" to particular subjects.

CBS' designation does not even approach the "reasonable particularity" required by Rule 34. It does not describe specific categories, but like a similar designation rejected by this Court in Public Administrator of New York County v. Rogers, 26 F.R.D. 118, 119 (S.D.N.Y. 1960), "seeks rather to have a general 'roving commission' to go through all the records of [defendant] to find out what statements, affidavits, transcripts and other evidence it may have."

Time Period for Discovery

CBS seeks documents for the period January 1, 1960 (and in some cases, from the 1940's and 1950's) to date. ASCAP objects to providing documents for any period prior to 1965 or subsequent to December 31, 1969, the date CBS filed its complaint.

CBS contends our proposed time limitation is without merit. Just as it will accept no limit on subject matter, so will it accept no limit on time.

This arises from CBS' erroneous conception of this action as (1) one involving hundreds of factual issues (CBS Mem., p. 83) and (2) a secret conspiracy. CBS, accordingly, cites cases primarily alleging covert, continuing conspiracies, or criminal activities (CBS Mem., pp. 8-15). In addition, many of CBS' cases concern conspiracies in the motion picture industry for which -- basically because of their complex, undisclosed plots and facts -- the courts have followed a rule of special liberality in discovery. See, Parion Theater Corp. v. RKO Theaters, Inc., 1970 Trade Cas. ¶73,302, at 89,175 (S.D.N.Y.); Prudential New York Theaters Co., Inc. v. Radio City Music Hall Corporation, 271 F.Supp. 762, 763 (S.D.N.Y. 1967).

Our case, of course, is different. The basic subject matter of this action, a licensing system that has been carried on under court supervision for over 30 years, is an open system in which CBS has willingly participated as a licensee. That system has not changed over the past 22 years, and certainly not since CBS filed its complaint.

In any litigation there must be reasonable time limits on document discovery. ~~Here~~, given the openness of ASCAP's activities, five years is appropriate. We are concerned with what ASCAP is doing today -- not with documents relating to the what or why of its activities ten or twenty or fifty years ago.

Summary

The overt, largely undisputed nature of ASCAP's licensing activities limits this action and distinguishes it from those cases relied upon by CBS.

Even in complex antitrust cases, Professor Moore has noted that the court is often called upon "to fashion some limits as to time and area in order to keep the case within manageable size." Moore's Federal Practice, ¶26.56[1], at 26-142 (1971). ASCAP asks the Court to do no more than that in this case.

We respectfully submit that CBS' quest, as shown by its preliminary set of definitions and instructions, is endless. Our discussion of specific objections, in the following pages, shows that this quest must be motivated by some desire other than to get ready to try this case on February 26, 1973.

Specific Objections

Rather than burden the Court with an item-by-item analysis of CBS' document requests, we shall group them under the major headings to which they are addressed and demonstrate why the requests in their present form should be vacated.

General Categories

Nothing better demonstrates the lack of merit in CBS' motion than its effort to sustain its so-called general categories (i.e., all ASCAP Board minutes, all communications with members, all advertisements, etc.).

CBS argues that

> "No doubt, we could have prepared a list of all the specific relevant subjects as to which we sought Board of Directors' minutes or advertising materials, and that list would have been as long as this memorandum. (CBS Mem., pp. 83-84)

In other words, CBS says it could have framed a proper request, but because such a request would have been lengthy, we should all take a short-cut and have ASCAP disgorge everything. Nothing in the Federal Rules of Civil Procedure requires such a result.

Let CBS prepare its list of "specific relevant subjects" and if that list happens to contain subjects not already on ASCAP's list (see p. 8, supra), we will gladly advise CBS of our position.

(We should note that we have already produced documents in the general categories dealing with the subjects set forth on p. 8, supra.)

ASCAP's Licensing Activities

CBS already has had extensive discovery concerning ASCAP's licensing activities under the Amended Final Judgment. The forms of licenses negotiated with broadcasters are annexed as exhibits to the stipulation of facts. The numbers of broadcasters taking blanket and per program licenses is a stipulated fact. Section IX proceedings commenced by users are reflected in the files of this Court. The subject was covered extensively at the depositions already conducted.

CBS now wants more. It says, for example, that it needs document discovery to prove that the per program license is really a blanket license at a higher rate. CBS thus says it needs extensive document discovery to prove the self-evident proposition that if a broadcaster with a per program license uses some ASCAP music on every

program and if the per-program rate is higher than the blanket rate, that broadcaster will be paying at a higher rate.

CBS says it needs discovery to prove that ASCAP, "with all the power of its combination," has resisted requests by users for per-program licenses. This is a good example of CBS' efforts to proliferate and confuse the issues in this litigation. CBS, on behalf of its television network, has never sought a per-program license. And if the claim being made is that ASCAP, as to third parties, has or is violating the provisions of the Amended Final Judgment as to per-program licenses, this lawsuit is surely not the proper forum for litigating that issue.

CBS says it needs discovery to prove that historically the only license offered by ASCAP has been the blanket license. But the facts on this subject are already established -- and they speak for themselves. The numbers of broadcasters taking blanket as opposed to per-program licenses today and for the last ten years is a stipulated fact. What conceivable need is there to go further?

In short, the subject of ASCAP's licensing activities under the Amended Final Judgment is an open book. CBS has already had extensive discovery on that issue. No more is needed.

Licenses Other Than Blanket; Direct Licensing

CBS asserts it needs extensive additional document discovery on ASCAP's consideration of requests for licenses other than the blanket form (i.e., per-use, per-performance, limited repertory, etc.). It also asserts a need for discovery on the issue of direct licenses from ASCAP members to users.

The fact is, however, that ASCAP has produced whatever documents it has concerning those subjects for the years 1965-1969. As to requests for licenses other than blanket not falling within that time period (i.e., the Shenandoah proceeding, litigation in the state of Washington, the NBC proceeding), ASCAP's position has been set forth many times in briefs, affidavits, testimony and other papers which are matters of public record, most of which, we are sure, CBS already has.

In addition, the subjects noted above have been covered extensively at the depositions.

Fixing Fees

To buttress its argument that ASCAP is guilty of price fixing, CBS would like to see every ASCAP document which relates to the manner in which ASCAP has negotiated with the television networks.

CBS' price-fixing contention has taken a new twist. CBS says discovery will show that what happens is that the user accepts ASCAP's best offer because everyone knows that this Court in a Section IX proceeding cannot be relied upon to fix a reasonable fee after a hearing on the merits and it certainly cannot be relied upon to fix a lower fee than ASCAP's best offer.

Apart from the air of fantasy which surrounds CBS' contention, we can be sure CBS would find it very useful to know just how ASCAP prepares for negotiations with a television network in the event that CBS loses this lawsuit and has to go back to the bargaining table with ASCAP.

In any event, the facts are plain and undisputed. All television network licenses to date have been the result of arms' length negotiation between the networks and ASCAP. Both sides have had the right to call upon this Court to fix a reasonable fee, after a hearing on the

merits, if they could not agree. Neither side has done so that other facts are possibly germane to the issues in this lawsuit.*

The ASCAP Distribution System

CBS seeks extensive document discovery concerning the ASCAP distribution system. We leave to the side the question of relevancy. The fact is that CBS already has had extensive discovery concerning the distribution system. It has all the relevant documents concerning the manner in which the system operates. Messrs. Marks and Fagan have testified at great length concerning the system's operation.

CBS, we submit, has failed to demonstrate why additional, open-ended discovery on this subject is required.

"Inaccessible" Music

CBS seeks a host of documents which it argues it needs to support its claims about "inaccessible" music (the names and addresses of all ASCAP members, a listing of their

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* CBS' memorandum continues to perpetrate the myth that it has no real bargaining power vis-a-vis ASCAP and must succumb to ASCAP's so-called demands.

compositions, documents concerning foreign societies and foreign repertories, etc.).

The fact is -- indeed, it has been stipulated -- that

> "There is a portion of the performance rights to ASCAP music appearing on [CBS] programs as to which it would be impracticable for [CBS] or producers [of CBS programs] to negotiate for licenses directly with the owners of the performance rights of said music."

Thus, no one disputes that CBS would have problems if it had to negotiate for all of its performance rights directly. And no one disputes what the nature of the problems might be (people travel, people move, people sometimes will not answer their telephones, etc.).

In these circumstances, there simply is no good reason for extensive and burdensome document discovery which will then be used to prove the obvious.

As to such matters as the size of the ASCAP repertory, the size of foreign society repertories, and the number of members in foreign societies, everyone knows these numbers are substantial. What conceivable difference does it make whether the ASCAP repertory contains 1,000,000 or 3,000,000 compositions or whether there are 100,000 or 130,000 members of foreign societies.

Surely there are more important facts to worry about in this case.*

Feasibility of a Per-Use License

The extensive additional discovery which CBS now seeks on this subject would be pointless.

As a result of deposing ASCAP's employees, CBS now knows all about the ASCAP computer, what it does and what its capabilities are. All that remains for CBS to do -- if it wants to -- is to hire its own computer expert to consider any questions of feasibility.

It would also be pointless to have further discovery on this issue until CBS tells us with some greater precision how its proposed per use license would operate. For example, one feature of CBS' proposal would be the right of ASCAP members to withdraw from ASCAP the right to license on a per-use basis. But we have no idea as to how, when or where CBS proposes that this right be exercised

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* We were prepared, for purposes of this action, to stipulate that the ASCAP repertory contained 1,000,000 compositions -- our best guesstimate at the present time. CBS insisted that the number be 3,000,000 because it found an ASCAP advertisement which used that number.

and we have no idea what the administrative or other problems might be in connection therewith.

Summary

There are, to be sure, other CBS demands which we have not discussed. To do so, would lengthen this memo unduly without adding anything of substance to the arguments we have already made.

The truth is that the issues on this motion would have been much simpler to discern if CBS, instead of serving a lengthy document request followed by a 100-page memorandum, had taken the shorter route and requested every document in ASCAP's files. The length of its papers should not obscure the fact that this is precisely what CBS is seeking to accomplish under a camouflage of verbiage and more verbiage.

We ask only that the Court impose some restraint on CBS so that the remaining discovery here can proceed on some reasonable basis and so that the real issues can be viewed in their proper perspective.

CONCLUSION

For the above reasons, CBS' motion should be denied in its entirety.

Respectfully submitted,

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September 27, 1972

EXCERPTS FROM CBS'S MEMORANDUM IN OPPOSITION TO ASCAP'S MOTION FOR A PROTECTIVE ORDER

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff, -against- AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.	(M.E.L.) 69 Civ. 5740

CBS'S MEMORANDUM IN OPPOSITION TO ASCAP'S MOTION FOR A PROTECTIVE ORDER

Statement

The deposition program which this motion interrupts is on the verge of blowing this case wide open. ASCAP needs protection from such depositions, to be sure; but not for any reason endorsed by the Federal Rules.

ASCAP also needs education and delay, as will become apparent later in this memorandum. And that is evidently the reason why this motion has been brought--for it is certainly not a motion, given any disclosure of what has actually occurred, on which ASCAP could reasonably have expected to prevail.

months earlier, as exhibits to their depositions).*

(f) Two statements specially prepared by ASCAP and produced by it in lieu of two categories of documents we had requested (which statements were largely incomprehensible and, on the deposition of the ASCAP attorney, Richard H. Reimer, who prepared them, turned out to be a fraction of what they purported to represent and, in many respects, inaccurate).

(g) Two one page forms used by ASCAP's Microfilm Department. (As it developed, these two pieces of paper were the only documents produced by ASCAP of any significance--not on their face, but because they led to questions, also on the examination of Mr. Reimer, which disclosed that ASCAP does maintain in its Microfilm Department a complete description, carefully indexed, of every file in its possession, thus belying every ASCAP objection to the Rule 34 Request that asserted the "impossibility" or "extreme burden" of locating its own files.)

2. ASCAP contends that "there are few, genuine

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* It may be noted here that if ASCAP had made a good faith production of even its own published articles limited to its own "relevant subjects", there would have been many more such articles furnished, for many more certainly exist.

factual issues" in the case and that none of them requires extensive discovery (Mem. 3). If that were true, it would be difficult to understand ASCAP's other ground, that CBS's discovery must be terminated so that ASCAP may commence extensive discovery of its own.

But, of course, it is not true. In addition to the specific factual issues outlined in the Court's Opinion denying ASCAP summary judgment, there are numerous Section 2 issues requiring discovery, such as market definition, ASCAP's power over price, its power to exclude potential competitors, and each act evidencing the "deliberation" and "specific intent" with which ASCAP has amassed such power. American Tobacco Co. v. United States, 328 U.S. 781, 808-815 (1946); United States v. Aluminum Co. of America, 148 F. 2d 416, 430-432 (2d Cir. 1945); United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 346 (D. Mass. 1953), aff'd per curiam 347 U.S. 521 (1954). Those facts are almost exclusively in ASCAP's possession and thus, as we have repeatedly stated, particularly in suggesting a severance of those claims for purposes of expedition, the establishment of those facts will necessitate considerable discovery of ASCAP personnel, ASCAP members and ASCAP files. Indeed, to claim, as does ASCAP, that discovery in a monopolization case of this nature involves "few genuine issues" is to confess a lack of sophistication about antitrust litigation that is not really creditable on ASCAP's lips.

Moreover, the numerical count of discrete factual issues (even assuming, contrary to reality, that the count here were small) would provide little insight into the necessary breadth of relevant discovery. Any one antitrust issue can, and often does, require more discovery than any ten issues involved in ordinary civil litigation.

As one example here, the most direct method of disproving the principal ASCAP defense (that "by-passing the Society" is a practicable alternative to the blanket license on which ASCAP insists) is to establish that the ASCAP membership would greet any such CBS attempt with a refusal to deal so reflexive and staunch as to make any such effort totally unrealistic. In its proof of that proposition--in effect, the ingrained attitudes of at least some significant number of 19,000 suppliers--a plaintiff should not be forced to rely on one or two depositions, but, obviously, permitted to conduct precisely the sort of deposition program which we are attempting to pursue.

3. So far from ASCAP's picture of "inefficient, ineffective and improper" depositions have these examinations actually been, that if future depositions are even half as effective as those conducted to date, this case may actually be triable by CBS without the need for calling a single ASCAP representative or member (which represents the most realistic hope for limiting this trial to 20 days).



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EXCERPTS FROM TRIAL MEMORANDUM OF DEFENDANTS ASCAP, ET AL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x
:
COLUMBIA BROADCASTING SYSTEM, INC.,
:
Plaintiff,
: 69 Civ. 5740
-against-
: (M.E.L.)
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al., :
4/25/73
Defendants. :

- -x

TRIAL MEMORANDUM OF
DEFENDANTS ASCAP, ET AL.

ASCAP may offer broadcasters a blanket license only on the broadcaster's specific request. Under that license, the broadcaster has the right to use any, some or all of the compositions in the repertory, and he pays annually either a fixed fee or a percentage of his overall revenues. As a matter of practice, nearly all broadcasters choose blanket licensing -- doubtless because of its convenience.

In addition, since under the Amended Final Judgment ASCAP may acquire only the non-exclusive right to license its members' works, users are free to deal with ASCAP's members directly.

Under the Amended Final Judgment, users who choose to license from ASCAP are assured that they may obtain a license from ASCAP for all works in its repertory, at a non-discriminatory rate, and that the rate will be reasonable -- since, if the parties do not agree, this Court will fix the rate in a proceeding where ASCAP has the burden of proof.

The Other Acronyms

At the trial, the Court will hear references to abbreviated names of organizations other than ASCAP and BMI. Among them will be:

"AGAC": The American Guild of Authors and Composers. AGAC is an association of approximately 2,500 music writers, formed in 1932 to represent the interests of the creators of music. Like



As we noted earlier, the two forms of license which ASCAP offers to CBS are the "blanket" and "per-program" licenses. CBS may choose either. And ASCAP is obligated to make the choice economically feasible: Section VIII of the Amended Final Judgment requires ASCAP, in proposing fees for the different licenses, to offer prospective licensees "a genuine choice."

We have already described the essential features of both forms of license. The great virtues of the "blanket" license are its convenience, and the incentive it offers CBS to make the most extensive use of music which the public interest may suggest.

Alternatively, CBS or its program producers have the option of dealing with ASCAP members directly. As we have seen, that option is a genuine one for the CBS television network. The Court need not accept our statement of that proposition; a rather disinterested authority, NBC, is available. Aaron Rubin, NBC's financial executive vice president, filed an affidavit in this Court in 1970 in which he said:

> ". . . present practices in the broadcasting industry with respect to the licensing of synchronization rights demonstrate the feasibility of individual negotiations concerning musical performance rights."*

---

* CBS has repeatedly quoted Judge Weinfeld's opinion in Schwartz v. BMI as suggesting that CBS' right to license directly is "more apparent than real." The quotation is unfairly ripped from its context. The full paragraph from which this phrase was taken makes it clear that Judge Weinfield did not mean

(Footnote continued on next page)



III.

THE CBS SCHEME WOULD BE AN UNLAWFUL RESTRAINT OF TRADE

There is an unlawful restraint of trade that merits the Court's consideration in this action, but it does not involve the activities of ASCAP or its members. It is, rather, the CBS scheme that is proposed here as a practicable alternative to the present system for licensing performance rights.

The CBS Scheme

One thing can be said with certainty about the CBS scheme: it is chameleon-like, changing color nearly each time it is seen.

For example:

(a) At the outset of this case, the "per-use" license was to be CBS' instrument for acquiring music performance rights. Now, we are told it would be used rarely -- performance rights, in a "per-use" world, would come to CBS from the packagers of its programs, who would obtain those rights directly from ASCAP's members.

(b) The scope of the "per-use" license also has changed. The complaint strongly suggested that the license would cover the entire ASCAP repertory.* Then we were told that it would embody only some "designated portion" of the repertory -- as yet undesignated. Most recently it has been suggested that the "designated portion" might include all of the compositions in the ASCAP Index of Performed Works, plus any other compositions as they are performed by CBS or perhaps any other user -- which would add up to no distinction between this "designated portion"

---

* CBS needs "the rights to use many, if not all, musical compositions in the ASCAP" repertory. (Cplt. ¶ 15)

and the entire ASCAP repertory.*

(c) At the start of the suit, we were not told how per-use rates would be fixed. We now know that CBS' proposal contemplates that this Court would do the fixing -- although we have not been advised in any detail how CBS proposes that the Court accomplish this task. This feature of the per-use proposal is of some interest in view of the testimony of CBS' executives that they lack confidence in this Court's ability to fix fees for performance rights licenses.**

(d) CBS proposes that ASCAP's members would have a right -- undefined -- to withdraw their compositions from the ASCAP repertory and thereby escape the "ceiling price." This feature flowered only belatedly -- at oral argument of ASCAP's motion for summary judgment. It has largely withered away, as we shall show in a moment.

(e) The last aspect of the "per-use" license that has thus far been revealed is the "administrative fee." No one yet

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* Mr. Poklitar, the CBS official proffered as the person most knowledgeable in making any designation, testified that, in order to designate CBS would require "consideration [of] the content of the ASCAP, BMI performed works index, review of past music logs, popularity charts from the trade papers, consultation with producers." Asked whether he or anyone else at CBS had ever done any of these things, he said, "No." (Poklitar, 194, 195-6)

** Dr. Stanton, for example: "I have more confidence in the marketplace for setting rates than I do have in the court procedure, with all of the problems attendant thereto. . . . I would like to cut out the Court and go direct to the sellers of the music." (Stanton, 127, 129-30)

knows, in precise detail, what it means, but it is perhaps the ultimate chutzpah in the CBS proposal. CBS' notion, apparently, is that ASCAP -- although its "per-use" license will be used only as a last resort -- will exist to service the direct licensing which CBS envisages between CBS' producers and ASCAP's members. CBS proposes to require ASCAP to monitor all performances, record them in its computers, compute charges, send out bills and make payments. In return for this service, CBS would pay ASCAP some "administrative fee." CBS apparently intends to spend days of testimony in demonstrating that ASCAP's computers could perform these services. There might be greater difficulty, we suggest, in finding a man willing to be president of ASCAP and accept the "administrative fee."

Such, in substance, is the "per-use" proposal as it has evolved to date.

Only one feature has remained constant: the "per-use" rate inevitably would be the ceiling price, and all "direct" transactions with ASCAP's members would take place at prices below that ceiling. For if any ASCAP composition is available to CBS at a "per-use" rate, under a "per-use" license, why would anyone -- CBS or any producer -- ever pay more than the "per-use" fee?*

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* Mr. Poklitar, head of CBS music clearance operations, admitted that the per-use rate would be a ceiling price. He said, "If it [the per-use rate] were a rate set by the court, I don't see where CBS would pay more." (Poklitar, 319)

We know of no other instance, nor can we imagine any instance, in which the seller of a product at retail is thus forced to bid against his wholesale price on which the buyer has a perpetual call.

The court-fixed "per-use" rate, in short, would become a ceiling price just as surely as the 2¢ mechanical royalty is a ceiling on licenses for phonograph recordings. But with this crucial difference: the 2¢ mechanical royalty was a legislative enactment of the Congress. CBS is asking this Court to make a similar legislative decision.

The CBS proposal has one final charm: the ceiling price would be an ever-decreasing ceiling. For CBS tells us that the court-fixed per-use rates would be adjusted, from time to time, to reflect the price levels of the direc transactions between CBS' producers and ASCAP's members. Since those price-levels necessarily would be lower than the original "per-use" rate, any newly-fixed rate reflecting those lower prices would be a lower ceiling. And so on . . . ad infinitum.

The Sherman Act, we submit, does not require such fixed maximum prices. As we understand it, the statute forbids them.

"Withdrawal of Rights"

CBS' only response to the inevitability of the price-ceiling aspect of the "per-use" proposal has been the suggestion

that ASCAP's members would be "free" to "withdraw" from ASCAP the right to license their compositions to CBS, and thereby avoid the ceiling price.

The "right to withdraw", however, has never been given any affirmative content by CBS. For example, we do not know, among other things, how it is to be exercised (orally, or in writing); when it is to be exercised; what notice the member will be required to give and to whom; whether the member will be able to restore his compositions to the repertory after they are once withdrawn; and, if so, on what terms; what notice, if any, the member will receive of a proposed use by CBS; etc. We suspect that there is good reason why CBS has not answered these questions: "withdrawal of rights" was an afterthought in the CBS scheme -- no one at CBS knows what the answers are.

It would be futile to engage in extensive analysis of the "right to withdraw" until we have some answers from CBS, should they ever be forthcoming. But even at this stage we do know certain things about the "right to withdraw" which demonstrate that it would be a meaningless right.

For example, CBS has also told us at depositions that it would permit "withdrawal of rights" only at penalty to the ASCAP member -- CBS would allow him to "withdraw rights" vis-a-vis CBS only if the member were required, simultaneously, to withdraw

rights as to ABC and NBC, even if those networks held ASCAP blanket licenses. Thus, to escape the CBS ceiling price, a member would be required to prevent the other two networks from using his compositions -- even though he had no assurance that he would get his music on CBS at any price.

And we know also from depositions that, if some number of significant ASCAP members withdrew their rights, in an effort to avoid the impact of a ceiling price, CBS officials would promptly "consult their lawyers."

Finally, even without depositions, we may readily anticipate the enormous pressure on ASCAP members not to withdraw their rights for fear of being barred from the CBS music empire.

Any member giving thought to the possibility of withdrawing rights necessarily would ask himself whether CBS would view him with disfavor. As a songwriter or publisher in disfavor with CBS, he might rightfully fear that he would be welcome neither at the television network, the owned and operated television stations, the radio stations, the record companies, nor anywhere else at CBS.

Perhaps one illustration will further highlight the emptiness of the alleged "right to withdraw." Let us suppose the hypothetical case where a producer has a compelling need for a particular composition (e.g., Irving Berlin's "White Christmas" to be sung by Bing Crosby on a Christmas eve special). In a true competitive market, the ASCAP member in these circumstances would appear to have some bargaining power. It is CBS' position that the member can have that same degree of bargaining power in a "per-use" world because he is free to withdraw his rights from ASCAP. But what would actually happen? The producer simply would not take the risk that Irving Berlin, if he knew of the proposed use of his song, would demand more than the per-use rate and withdraw his rights from ASCAP if he could not get it. Rather, the producer would simply use the song and resort to the ASCAP per-use license at the per-use rate.*

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* We have more than logic to demonstrate this point: CBS's Mr. Poklitar testified as follows:

> "Q. Under a per-use license, as you understand it, would CBS Television Network inform the writer or publisher of a composition in the ASCAP or BMI repertoires which had been designated by CBS to be included in the per-use license that CBS Television Network intended to perform the composition prior to the performance?
>
> * * * [Colloquy]
>
> A. At this point in time, I don't think we would." (Poklitar, 206-08)

In other words, in the rare instances wnere an ASCAP member might be able to command a rate higher than the per-use rate in direct negotiations, he would never be given the opportunity. There would be no negotiations -- the song would be performed under the per-use license and payment made at tne per-use rate.

So much for "withdrawal of rights" as an answer to the ceiling price feature of CBS' scheme.

CONCLUSION

ASCAP's current blanket agreements with tne NBC and ABC television networks provide that, if ASCAP offers other terms to CBS, it must make the same terms available to NBC and ABC.

Viewing this litigation in this light, its real significance is clear.

CBS, NBC, and ABC could never lawfully agree among themselves that they would establish price ceilings for performing rights -- nor that they would all "insist" that their producers bring them programs with performing rights annexed. No scneme more patently violative of Sections 1 and 2 of the Sherman Act could readily be conceived.

Except with the imprimatur of a Federal court.



EXCERPTS FROM BMI TRIAL MEMORANDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

COLUMBIA BROADCASTING SYSTEM, INC., :

Plaintiff, :

-against- : 69 Civ. 5740 (M.E.L.)

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., : 4/25/73

Defendants. :

- -x

TRIAL MEMORANDUM

Of Counsel:

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filming began even if he were not sure that CBS would eventually purchase the feature film or program. As long as there were the possibility of a purchase by CBS, such rights would have to be obtained by the producers. Thus, the withdrawal right - a right which in fairness the writer or publisher absolutely must possess - will result in occasions on which CBS will be unable to use finished material without paying very large sums for performance rights. Clearly, CBS would find this intolerable.

3. A Per Use Defect: The Excessive Administrative Costs

The per use proposal adds administrative costs at so many points in the system and in such amounts as to make it highly unlikely that per use licensing could ever result in lower costs to CBS. A few of these elements of added costs are set forth below:

Added Costs to CTN

- staff to negotiate for and prepare direct licenses.
- staff to obtain direct license documentation from producers.
- staff to supply negotiating information to producers and packagers.
- staff to add and delete works in nucleus.
- costs of litigation with respect to per use rates.

Added Costs to Writers and Publishers

- staff to negotiate and prepare draft licenses.
- staff to monitor direct licenses.
- equipment to monitor direct licenses.

Added Costs to BMI

- staff to monitor performances by per use licensees.
- equipment to monitor performances by per use licensees.
- staff to establish a system to administer per use licenses.
- equipment to administer per use licenses.
- staff to administer per use licenses.
- staff to administer withdrawals of rights.
- staff to analyze direct licensing documentation.
- staff to add works to and delete works from nucleus.
- costs of litigation with respect to per use rates.

Added Costs to Producers

- staff to negotiate and prepare direct licenses.
- staff to obtain negotiating information from network.
- staff to supply networks with direct licensing documentation.

The total of the administrative costs incurred by CBS, BMI, the numerous writers and publishers whose works are performed on CTN, and the score or more of producers or packagers of CTN programming could well amount to millions of dollars. One way or another, the user of music - CBS - must bear these costs. As Richard Jencks has noted, the administrative costs of a blanket license are "insubstantial" in comparison to the cost of administering a system under which producers acquire rights directly. (Jencks Dep. pp. 72, 74.)

On the other side of the coin, such savings as might be achieved in direct dealings under a per use system would not necessarily be enjoyed by CBS; in cases in which the producer

first obtained public performance rights. In particular cases, the writer or publisher could have sufficient leverage to command a very high license fee payment. But the producer could not pass this cost on to CBS, for according to CBS' testimony, the producer's budget would provide for acquisition of music at the per use rates. (Jencks Dep. pp. 95-97.) If it cost the producer more, the loss would be on him and not on CBS.

Finally, the producer has no assurance that his film will eventually be broadcast by CTN rather than a user which already has a performance license, in which case his entire license payment would be wasted.

C. Per Use Licensing Is Not Feasible For Writers and Publishers.

The administrative problems of the writer or publisher in attempting to cope with per use licensing are probably insoluble.

First, he, even more than the program producer, will suffer from lack of the basic information needed to negotiate a fair direct license fee. CBS has said that the problem of mutual ignorance can be solved by a license providing for additional fees for additional performances. This, however, creates a substantial additional problem for the writer or publisher. He would have to monitor performances in order to determine whether he has been paid all that is due and owing to him.

Furthermore, this solution does not meet the objection that the users' income from a program is a relevant and important ingredient in any fee determination. The user's income historically has been one of the most important factors in determining

appropriate levels of license fees. Dance halls pay less for public performance licenses than do television networks. The user's income figure will reflect such factors as the size of the audience and the value of the entertainment package offered by the user.

In a very real sense, this litigation can be viewed as an attempt to remove this vitally important element from the bargaining arena. Neither the producer nor the writer or publisher knows what income CBS will enjoy in general, or what income CBS will enjoy in respect of a particular program on which music will be used. Thus, neither the producer nor the writer or publisher forced to deal with theproducer is in a position to make an intelligent judgment as to the value of a public performance license on a particular composition for the CBS network.

The writer or publisher's right of withdrawal, in addition to creating administrative problems for everyone else, is difficult for the writer or publisher to exercise. First, the right may be completely illusory, since CTN may opt to use his music without notifying him. In addition, since he would be forced to sacrifice the possibility of NBC's or ABC's using his music pursuant to their blanket or per program licenses, in order to make an intelligent decision as to withdrawal he must be able to learn what plans those networks and their independent producers have for the music. This problem would probably defy solution.

* * *

United States District Court

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 5740
(M.E.L.)

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff,

—against—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al.,
Defendants.

PLAINTIFF'S POST-TRIAL BRIEF

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April 8, 1974

Co. (U. K.) v. *S. S. Giovannella D'Amico,* 297 F. Supp. 699, 701 (S.D.N.Y. 1969).

The application of that rule to this case, especially with respect to the 3M incident, is immediately apparent. ASCAP, of course, did not ignore the incident entirely. It called Mr. Chiantia to testify that MCA had dealt with 3M (although only after being assured that a deal with ASCAP was no longer possible and after overcoming considerable intracompany opposition). Mr. Shulman also testified, but did not explain the basis on which the principals of TRO refused to deal—and those principals were not called.*

Not one witness, moreover, from Chappell, Morris, Frank, Berlin, Warner Brothers, The Big Three, Paramount/Famous, or Bregman appeared to explain why a highly profitable, no-cost, no-risk deal was repulsed even after the ASCAP-3M negotiations had irretrievably come apart.** To paraphrase the words of the Supreme Court in *Interstate Circuit, supra:*

> the failure under the circumstances to call as witnesses those officers who did have authority to act for the publishers who refused directly to license 3M is itself persuasive that their testimony, if given, would have been unfavorable to ASCAP.

D. *Per Se* Categories of Offenses and Copyright Misuse.

The elimination of price competition achieved by the ASCAP and BMI combinations is, as shown above, a *per se* violation of the Sherman Act. As such, defendants' allegations of justification are irrelevant, although it is apparent on this record that they are unsubstantiated as well. Moreover, there is no supportable contention that

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*Mr. Arrow testified that he had no contact with Mr. Shulman in the negotiations with TRO, which were conducted for that company by Messrs. Richmond (the chief executive officer) and Brackman (PF 69). Mr. Shulman did attempt to explain the statement in his letter to Arrow which rejected the 3M proposal as "a matter of policy" (3M PX 47) and gave his own reasons why he thought the 3M proposal unattractive (*see* Comment to PF 68 regarding the inherent implausibility of that testimony). It was Mr. Richmond, however, who made the decision, and ASCAP made no attempt to explain either his reasons (or those set forth by Brackman in his deposition) or his contemporaneous statement that "nothing goes ahead until there's an industry decision" (3M PX 168).

**Chappell, Morris, Warner Bros., the Big Three, Paramount/Famous and TRO are all named defendants in this action.

plaintiff could avoid the injury of which it complains by attempting to by-pass these combinations; that purported alternative is neither sufficient in law as a defense nor practicable in fact (PF 77).

On these bases alone, the liability issues should be resolved in plaintiff's favor, and it is thus unnecessary to the decision to affix particular labels to the offenses by which defendants have accomplished their anti-competitive result. Yet, for the purpose of complete analysis it may be briefly observed that defendants' practices do, indeed, fall into three separate *per se* pigeonholes of antitrust doctrine as well as constitute copyright misuse.

1. Price-Fixing.

The essence of the price fixing offense is an agreement among competitors not to compete on a price basis. *Citizen Publishing Co. v. United States,* 394 U. S. 131 (1969). The classic form of such an arrangement in this market would be effectuated by an agreement among music suppliers to charge television networks $800 for each feature use. There is plainly no economic difference between an agreement of that nature and one under which the suppliers pool their rights, license them in a package, delegate a board to set a single price for that package, and then distribute to themselves out of pooled revenues $800 a feature use (or $600, or $400, or whatever distributable amount total royalties divided by total uses generates). Consequently, there is no difference in the legal treatment given to those two forms of arrangement; both are price-fixing agreements; both are unlawful *per se.*

2. "Tying" (Accessible/Inaccessible Music).

In any given year, it is perfectly evident that a substantial quantity of the music used on CTN would have been transactionally "accessible" from ASCAP (and BMI) members directly and that a substantial quantity would not. Paragraph 13 of the CBS-ASCAP stipulation of May 25, 1972 (CX 2), states as much with respect to ASCAP music (a conclusion which applies to BMI music through the CBS-BMI stipulation of October 15, 1971—CX 3). Moreover, the present substantiality of the "inaccessible" category is demonstrated by the very proof which establishes the impracticability of a by-pass.

* * *

EXCERPTS FROM ASCAP'S POST-TRIAL BRIEF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,	:	
Plaintiff,	:	69 Civ. 5740
-against-	:	(M.E.L.)
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,	:	
Defendants.	:	

ASCAP'S POST-TRIAL BRIEF

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Of Counsel

Because most of CBS' programming consists of filmed and taped dramatic and comedy shows, the vast preponderance of the music performed on CBS today is background and theme music.* Non-entertainment programs (news, special events, etc.) "rarely" use any music (Stanton, EBT 140-42). The variety shows, the only programs making regular use of feature music, constitute only about 5% of CBS' total programming -- and they use theme and background music also (AX 286, 287; PX 540-41).

Theme and background music is music specially created for a television program or motion picture; theme music accompanies the titles, background music the action. As described by John Green, the producer typically will film or tape the program and then hire a background composer to view the film, determine which action requires musical background, score the music, hire the musicians, and arrange and conduct the music scored. The producer hires and pays the writer a fee for creating, arranging, and conducting the music, and acquires from its "employee

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* AX 286 is a slender ASCAP computer run (108 pages) which lists all feature performances of music on CBS during the first quarter of 1972 (no theme or background). AX 287 is a lengthy two-volume ASCAP computer run (1421 pages) which lists all ASCAP performances on CBS during the same period (feature, theme and background).

* * *

Usually, the producer of a television show, or his agent, will call and obtain bids from the Harry Fox Office on a number of compositions, although the range of prices is quite small -- generally between $50 and $150 (Berman, R. 924-25). After he decides which composition he wishes to use -- indeed, frequently after he uses it -- he enters into a synchronization license with the publisher (Berman, R. 925, 966-67, 979-85). Albert Berman of the Harry Fox Office testified that publisher quotations for synchronization rights in television are open for 30 days (R. 966).

Accordingly, for previously-published music a channel of communication between the producer on the one hand, and the creator or publisher on the other, is already in existence. Again, all CBS needs to do to have this channel used for the negotiation of music performance rights is to push the button.*

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* The parties have stipulated that:

> "Very few individual broadcasters have ever requested performance rights licenses directly from individual ASCAP members. It shall be deemed that ASCAP members have not established facilities or procedures for processing such requests." (CX 2, ¶ 16).

There is nothing in the record, however, which remotely suggests that the modification of existing facilities for obtaining synchronization rights would pose any insoluble problems for any of the parties (Berman, R. 973-74). Since negotiations for performance rights are likely to be

* * *

cont'd

* * *

If this is the foundation for CBS' edifice of "disinclination," then, we respectfully suggest that the building under construction can never rise.

F. Summary

We have sought in the preceding pages to summarize the principal facts that emerged from trial.

Our first objective has been to give the Court a multi-dimensional understanding of the music performance rights business, ASCAP's history and growth, and its present functions. These facts demonstrate that, contrary to CBS' intimations, ASCAP was not created in original sin, and it does not exist today as an unlawful combination of copyright proprietors whose aims are to oppress CBS and to prevent competition amongst its members.

Against this background, we next summarized the facts about CBS -- its size, its resources, its richness in talent, its position as one of three national television networks, its past participation in the present system and, finally, its posture today as a user of music.

These facts demonstrate, we submit, that CBS is fully capable in every respect of achieving what it says it wants -- direct licensing transactions with copyright proprietors. It can achieve that result if it will only stop litigating with ASCAP and start negotiating with copyright proprietors.

With the foregoing in mind, we turn to the second category of evidence we cited earlier -- the points of views, opinions, etc. about the hypothetical universes of direct licensing and per-use licensing.

* * *

* * *

In short, this lawsuit -- if it had to be brought at all -- could have proceeded along more traditional lines --

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Footnote cont'd

"Q I would like you to assume that you were chief executive of the CBS television network and one of your assistants came to you with the idea that you should bypass ASCAP and BMI, drop your ASCAP and BMI licenses, while ABC and NBC retained theirs, but pointed out to you that you were in the middle of a season, you had a number of programs in the can and specials that you wanted to rerun and, of course, if you dropped your ASCAP and BMI licenses you would not have performance rights for those programs.

Is this a situation which you as the chief executive of a television network would voluntarily put yourself into?

"A The supposition is that we are in the middle of the season?

"Q Right.

"A And that we have a lot of shows in the can?

"Q Right.

"A Or committed, in the can.

"Q Right.

"A And that the ASCAP relationship was going to terminate tomorrow?

"Q No. The question was posed to you should we terminate that relationship tomorrow and voluntarily put ourselves in this position of having a lot of programs in the can without performance rights.

"A In the television business I would recommend we not do any radical changes for tomorrow. I mean, it doesn't make sense to change something that quickly, over 24 hours, never. I wouldn't cancel a trucking contract over 24 hours." (R. 3431-32).

with proof of deeds that allegedly violated the antitrust laws, not of allegedly evil thoughts someone might harbor about some hypothetical future.

But since, by CBS' choice, the "opinions" are here and are all we have, we shall deal with them.

* * *

We think it important, at the outset, for analytical purposes to define the two hypothetical universes and to summarize the differences in the opinions that were offered about how each might function.

Direct Licensing

In the universe of direct licensing, CBS and/or the producers of its programs would seek to obtain the music performance rights they needed directly from copyright proprietors.

While it could be argued that a market in which many, many copyright proprietors had to deal with a small group of buyers for the right to have music performed on one of three national television networks is hardly the economist's model of a free, competitive market, it is at least a market without any artificial restraints on the

* * *

* * *

not press down a ceiling price on the market.*

Surely the principle of "least restrictive alternative" requires that, before an entire industry is turned on its head, CBS try the alternatives now available to it.

CBS is saying in effect, that ASCAP members, who join ASCAP to become part of the market for licensing performance rights, should now be punished by the imposition of the per-use system and ceiling prices -- not because they engaged in any unlawful practice, not because there is any probative evidence that they would not deal directly with CBS; but because CBS now does not want to deal with ASCAP.

The Court, we submit, must reject that CBS demand.

B. The "Alternative Relief" Requested Should Be Denied

Dr. Steiner said that an injunction barring ASCAP from licensing all three television networks would be

---

* Dr. Fisher did argue that the per-program rate would operate as a "ceiling" (R. 1723). But he was confusing different senses of the word "ceiling." He was saying only that the per-program rate would, as to a particular program, serve as the highest total price that a packager would pay for all of the music on his show; it would not be a ceiling against which any individual composition or individual copyright proprietor would have to bid.

"ridiculous" because it would remove from the market a transactional mechanism that has shown itself, over the years, to be an efficient means of licensing performance rights. That fact, in itself, is sufficient reason for denial of the injunction that CBS now purports to seek.*

The requested injunction must be denied for other reasons as well. As we have seen, ASCAP serves CBS as a convenience, not as a necessity. But issuance of the requested injunction would force the other networks to comport themselves with whatever CBS thinks its entertainment policy might be without an ASCAP license.** CBS' request, in short, would condemn the public and CBS' competitors to only the kind of entertainment which CBS, in its wisdom, wanted to broadcast.

---

* An injunction, of course, would expose CBS to infringement actions for "spontaneous" uses of music. Mr. Sipes (R. 260) testified he does not know how much spontaneous music is used on the network. We may note, moreover, that Mr. Wright testified that an immediate injunction barring ASCAP from licensing the television networks would be "chaos . . . I couldn't operate." (Wright, R. 545).

** If NBC, for example, wished to broadcast a spontaneous, live Johnny Carson show, or if ABC wished to broadcast, as it now does, college football games and half-time shows in which the bands are permitted to play whatever music they wished, CBS' request for an injunction would bar them -- and would deprive the public -- of that kind of programming.



United States District Court

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants.

69 Civ. 5740 (M.E.L.)

BMI POST-TRIAL BRIEF

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United States District Court

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants.

69 Civ. 5740 (M.E.L.)

BMI POST-TRIAL BRIEF

This brief is submitted on behalf of defendants Broadcast Music, Inc. ("BMI"), *et al.*, with respect to the liability issues tried between May 1, 1973 and December 15, 1973, arising from the request of plaintiff Columbia Broadcasting System, Inc. ("CBS") for a "per-use" license for its television network, or for an injunction against the licensing of any television network.

Statement of Facts

The Parties

Plaintiff CBS operates CBS Television Network ("CTN"), one of three national television networks. CTN supplies network television programs to approximately 200 affiliated television stations throughout the country. CBS is a giant in the field of music and entertainment; in addition to CTN, CBS owns and operates five television stations, fourteen radio stations, one of the four national radio networks, the world's largest record company, several music publishing companies, and a number of other businesses (CX2; Tr. 4615-16).

Defendants BMI and American Society of Composers, Authors and Publishers ("ASCAP") are engaged in the business of granting to users of music non-exclusive licenses

for the non-dramatic public performance for profit of copyrighted musical compositions. They acquire the rights to grant such licenses from copyright owners.

The remaining named defendants are composers, authors or publishers of music. Those listed following ASCAP in the caption of the complaint are members of ASCAP and have been declared the representatives of the class of ASCAP members; those listed in the caption following BMI are BMI affiliates and have been declared the representatives of the class of BMI affiliates.

CBS' Complaint

In its complaint CBS charged that it had always "received" blanket licenses from BMI and ASCAP for CTN, and that it had therefore been compelled to pay performance royalties with respect to programs which used no music, and to pay the same royalties for a program using only a single composition as for a program using many compositions (¶¶ 14, 19).

The Blanket License

What is this blanket license that CBS finds so oppressive? The blanket license is a license giving CBS, at an extremely modest cost, the widest latitude in music selection and the opportunity to present to the public the finest in programming. The blanket license is a license to use all of the hundreds of thousands of compositions in the repertory as many times as desired without any need for advance notice or negotiations, and without risk of failure to reach agreement.

CTN telecasts approximately 7,560 programs per year.* The highest license fee CBS has ever paid BMI is $1,700,000 per year, the interim fee currently in effect. This means that CBS is paying less than $225 per program for the unlimited right to perform any of the compositions in the

* From PXs 541 and 546, CTN program schedules, it is calculated that 1890 programs were telecast in the first quarter of 1972.

BMI repertory. CBS is currently paying ASCAP an interim fee of $4,320,000 per year. This comes to $571 per program. Hence, for less than $800 per program, CBS is licensed to use practically all of the hundreds of thousands of compositions which might be performed on the network. And less than half of this cost is actually borne by CBS. Pursuant to CBS' contracts with its affiliated stations, CBS passes on one half of the cost of the BMI and ASCAP licenses to the local stations (Stanton Dep., Tr. 2739, 2764-65, 2776; Ex. 1 to CX2). Furthermore, CBS annually receives back from BMI and ASCAP many thousands of dollars in payment for CTN performances of theme and background music controlled by CBS' music publishing subsidiaries April Music and Blackwood Music (see, *e.g.*, Dean Tr. 1826; PX484). CBS' true cost for performance rights for practically all of the music it could possibly use is thus less than $400 per program.

How do these amounts compare to what CBS spends on programming? CBS pays about $200,000 for each episode of a one hour variety show (Dann Tr. 3292). Ordinarily, an hour of story programming costs even more (Silverman Tr. 4757). A one hour variety special costs CBS anywhere from $450,000 to $700,000 (Dann Tr. 3272). And a made-for-TV film can cost as much as $750,000 (Dann Tr. 3237). Compared to these sums, amounts paid for music performance rights are piddling. (Cf. Dann Tr. 3303: "You know, $2,000 over or under at any point nobody in our business ever looked very hard at.")

The fact is that music performance rights under blanket licenses are a bargain. As music publisher Leon Brettler said,

> "• • • I think music is sold by ASCAP to the networks to all users at very, very low prices.
>
> "I, as a publisher, as a board member, individually and in whatever official capacity I have, really sincerely feel that the purchase of music by the users in this country • • • is a tremendous bargain." (Dep. 316)

Other Available Licenses

In addition to the blanket licenses which have proven most popular with users, BMI and ASCAP are required by consent decrees to offer per program licenses. A per program license also gives the user the right to perform any composition in the repertory, but a fee is charged only with respect to programs in which a composition licensed from the repertory has been performed. The ASCAP consent decree provides that the fees for a blanket license and a per program license should be such that the user has a "genuine choice" between them; the BMI decree provides that the relationship between the fees should be "justifiable by applicable business factors * * *." (CX2, Ex. 10, ¶¶ VII(C), VIII; BX114, ¶ VIII(B))

Apart from the licenses offered by BMI and ASCAP, a user of music is free to obtain licenses directly from authors, composers and publishers. Members of ASCAP grant ASCAP only a non-exclusive right to license their works, and remain free to grant performance licenses to any user (see ASCAP Consent Decree, Ex. 10 to CX2). BMI affiliates equally remain free to grant performance licenses directly to users. While the BMI Consent Decree (BX 114) differs from the ASCAP Decree in form, CBS has stipulated that in substance BMI writers and publishers are as free as ASCAP members to grant public performance licenses directly (CX3).

In spite of these various available methods of licensing, CBS claims that it has been compelled to accept blanket licenses, and that ASCAP and BMI have restrained trade merely by offering blanket licenses.

CBS' Proposed Relief

CBS demands that BMI and ASCAP be required to offer CTN a new form of license, the terms of which have proved particularly variable and elusive. The elements of what CBS calls a "per-use system", as eventually glued together in PX881, are as follows:

(1) CTN would pay BMI (or ASCAP) a specified fee for each use of BMI (or ASCAP) music covered by the license ("per-use reservoir"), and not licensed directly from the copyright owner, plus an administrative fee.

(2) The fee for each use would be fixed in a schedule reflecting the nature of the use (*e.g.*, feature, theme or background) "and such other factors as may seem appropriate." The fee schedule might provide different prices for comparable uses of different works.

(3) If the fee schedule cannot be fixed by agreement between CBS and the defendants it is to be set by the Court.

(4) CTN and its producers may obtain licenses to compositions remaining in the per-use reservoir directly from the copyright owner.

(5) The per-use rate schedule "would be adjusted at periodic intervals to reflect prices" arrived at in direct licensing transactions.

(6) Each per-use license could cover only a portion of the BMI or ASCAP repertory if CTN designated such a portion (see Statement of CBS Counsel, Tr. 43). Newly composed music would enter the per-use reservoir if it entered the BMI or ASCAP performed works index.

(7) Each copyright proprietor would have a limited right to withdraw any of his works from the per-use reservoir "on reasonable notice or at periodic intervals (*e.g.*, quarterly)." The right of withdrawal would not extend to spontaneous uses or other unplanned uses, nor to music taped or filmed prior to withdrawal even though performance occurred after withdrawal.

In the event that its per-use proposal is not granted, CBS has proposed as an "alternative" that BMI and

ASCAP be enjoined from granting any type of license to any television network; however, for "music in the can" and unanticipated uses of music, CBS nevertheless asks for per-use licenses (see Post-Trial Brief p. 2).

The Issues Tried

On June 12, 1972, this Court ordered trial of the following limited issues:

> "(i) Whether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint;
>
> (ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anti-competitive means."

One searches CBS' Post-Trial papers and its trial evidence in vain for any recognition that these were the issues to be tried.

Instead CBS quotes a portion of this Court's earlier opinion denying a motion for summary judgment as if to say that there is no issue in this action as to whether CBS has been "compelled" in restraint of trade and that the only issue is whether the system proposed by CBS can function "on a more competitive basis" (Post-Trial Brief, p. 2).

This is an argument which was advanced by CBS in pretrial conference prior to the framing of the Court's order of June 12. CBS' argument was rejected then, and is entitled no greater consideration now. As the Court's order recognizes, a plaintiff has no right to impose a new way of doing business on defendants unless he can show that they are somehow violating his rights under the antitrust laws.

CBS has failed to carry the burden of proof on this threshold issue, as well as on all other issues in the case.

The Burden of Proof

CBS, as the plaintiff, has the burden of proving every element of its antitrust claim by a preponderance of the

evidence. See, *e.g.*, *Denver Petroleum Corporation* v. *Shell Oil Company*, 306 F. Supp. 289, 300 (D. Colo. 1969); *Independent Taxicab Operators' Association* v. *Yellow Cab Company*, 278 F. Supp. 979, 983 (N.D. Cal. 1968); *Kinnear-Weed Corp.* v. *Humble Oil & Refining Company*, 150 F. Supp. 143, 160 (E.D. Tex. 1956).

First, CBS must prove that the defendants' conduct constitutes an unlawful monopoly or an unreasonable restraint of trade and that the defendants have compelled CBS to take blanket licenses as alleged in the complaint. Second, CBS must prove that the alternatives it proposes—namely the per-use system and the combination injunction-per-use system—would increase competition.

A Summary of the Relevant Evidence

Little of plaintiff's evidence has been directed toward the first issue which the Court order tried, *i.e.*, whether the defendants' conduct has constituted an actionable restraint of trade and has compelled plaintiff as alleged in the complaint. In lieu of presenting evidence of restraint of trade, CBS has maintained that it should win as a matter of law and has sought to maneuver this case into a set of so-called "per se pigeonholes" (see CBS Post-Trial Brief p. 56). The case does not fit in those pigeonholes, and the evidence at trial shows that the defendants in fact have not unlawfully restrained trade in the licensing of performance rights (see pp. 113-28).

The Present System and CTN's Music Usage

At present, music performance rights may be obtained through blanket licenses from BMI or ASCAP, per program licenses from BMI or ASCAP, or direct licenses from any writer or publisher who is an affiliate of BMI or a member of ASCAP. CBS has always chosen the blanket licenses offered by BMI and ASCAP. The evidence shows, however, that CBS has never been compelled to take blanket licenses.* If CTN had taken other types of licenses it could

* For its radio network, CBS has taken a per program license (BX 101).

have avoided the conditions of which it complains, *i.e.*, paying royalties with respect to programs that use no music and paying the same royalties for programs that use one composition as for programs that use many compositions.

In order to determine what kinds of licenses would satisfactorily meet CTN's needs, it is necessary to know what portion of CTN's programs use music, what kinds of music they use, and where that music comes from. As the following examples show, CBS' presentation has obscured the answers to these questions. CBS' economist developed a formula to assess whether CBS could profitably turn to a combination of per program and direct licensing. A key factor in the formula is the percentage of CTN programs which use no ASCAP music (see p. 24 below). However, not one of the music studies introduced by CBS reveals how many CTN programs use no ASCAP music. Further, CBS' witnesses talked only of the musical variety form of programming, although variety programming constitutes less than 2% of CTN's programming. And these witnesses focused their testimony on already published compositions used as feature songs, whereas the vast majority of the music used on CTN is background and theme music specially created for the program by composers hired for that purpose.

Fortunately, however, we do not have to rely on what CBS has chosen to disclose. ASCAP has introduced computer records for a sample period that reveal precisely which CTN programs used ASCAP music and which did not, whether the music used was feature, theme or background, and who published the music that was used. These records, used in conjunction with CTN program schedules, allow calculation of the relevant figures (see pp. 16-18). The results are devastating to CBS' case.

28.6% of CTN's programs used no ASCAP music at all. 9.3% used only music that is owned by CBS. And 45.5% used only music that is controlled by the program packager or others connected with the program. For these programs, 83.4% of the total, CTN obviously did not need any license

from ASCAP. At most it needed to have the program packager deliver music performance rights along with the other program elements—which is what CBS keeps saying it wishes to accomplish by this action.

Further, of the 16.6% of programs using some music of outside publishers, 6.8% used the music of only one outside music publisher, and 6.1% more used music controlled by between two and six outside music publishers. Clearly, direct licensing would be feasible for the overwhelming majority of CTN programs.*

The feasibility of using direct licenses for almost all, if not all, of CTN's programs proves that CBS has not been compelled to take a blanket license.

The Birth and Death of "Disinclination"

Originally the only obstacles to which CBS pointed in support of its claimed inability to obtain performance licenses directly for CTN programs were mechanical obstacles. When the evidence began to mount that there were no mechanical obstacles (see pp. 33-40), and that all of the necessary lines of communication are already open, CBS introduced a claim that writers and publishers would refuse to grant CTN performance licenses if CTN approached them. This claim is not supported by the record and is totally disingenuous (see pp. 40-103).

The principal material that CBS has presented in an effort to sustain its burden of proving "disinclination" consists of evidence as to a direct licensing operation carried out by the Minnesota Mining and Manufacturing Company ("3M") in the mid-1960's. However, 27 of the 35 publishers that 3M contacted did grant direct licenses, and five of the others later attempted to reopen negotiations (see pp. 42-60). CBS also quotes words and phrases from several depositions in an effort to prove disinclination, but when the words and phrases are read in context and other portions of the depositions examined, they show that these publishers would negotiate with CTN if CTN asked (see pp. 66-77).

* CBS has stipulated that direct licensing with BMI affiliates is as feasible for CTN as direct licensing with ASCAP members (CX3).

At trial a number of writers and publishers testified that they would certainly negotiate with CTN for direct licenses and explained why they could not do otherwise. Their testimony was supported by the opinions of industry experts and expert economists, and as well by considerable evidence of objective factors showing that it would indeed be "stupid" or "suicide", as the publishers characterized it, for them to refuse to deal with CTN or to try to hold up CTN for exorbitant fees (see pp. 66-84, 106-10).

Finally, despite CBS' earnest efforts to avoid disclosure, there are now in the record clauses from a number of CBS contracts, revealing that CTN in fact has succeeded in obtaining music performance rights to BMI and ASCAP music directly from the producers and distributors of many of the programs shown on CTN (see pp. 84-89).

CBS' speculations that writers and publishers would refuse to grant CTN direct licenses for performance rights are contradicted by the 3M experience, by the deposition testimony, by the live testimony, and by CBS' own recently disclosed contracts. Since the direct licensing alternative is certainly possible for almost all if not all CTN programs, CBS has failed to show any restraint of trade by the defendants in making blanket licenses available.

In the Can: Out

As part of its disinclination theory, CBS contended that any attempt at direct licensing would cause CTN to risk the loss of more than $100 million, representing the cost to it of its inventory "in the can". The contracts pursuant to which CTN acquired this inventory disclose that in many cases CTN has already negotiated for and acquired music performance rights directly. Review of these clauses, and of other clauses which either allow CTN to escape from its contractual obligations or indemnify it in the event of music clearance problems, shows that CBS' inventory figure is inflated by tens of millions of dollars (see pp. 87-89, 105). More importantly, the "risk" to CBS is not the cost of the entire program but what it would cost to use the music. This would be the cost of a per program fee or the cost of

being held liable for the value of the performance of the music in infringement h[illegible]n either case a small fraction of the program cost.

Finally, to the extent that CBS has not contracted for performance rights, its "in the can" situation is not the fault of the defendants, it is the fault of CBS. No one refused CBS a license before CBS put this music in the can; CBS never asked. CBS would be in the same position if it had put a program in the can without any of the other licenses required for telecast, such as synchronization licenses and rights to copyrighted script.

Per-use and Injunction: Proposals To Limit Competition

CBS' principal proposal in this case is that a per-use system of licensing be ordered, which would allow CTN to perform music at fixed rates for each use, or to bargain the copyright owner down from the fixed per-use rate. When the "ceiling" effect of this proposal was pointed out, CBS said that copyright owners who did not want to accept the ceiling feature could withdraw their works from the per-use reservoir.

It became clear at trial, however, that the right of withdrawal was designed only to create an appearance of fairness, and would in fact be wholly illusory. Because of the interchangeability of musical compositions for television use, a copyright owner who withdrew his music from the per-use reservoir would not have his music used on CTN. A copyright owner would be confronted with the choice of submitting to the per-use system and receiving a ceiling price or less, or of withdrawing and not having his music used at all. He would be damned if he did withdraw, and damned if he didn't (see pp. 150-60).*

The CBS per-use system, therefore, is designed to be a very effective ceiling on the prices that CTN might have to pay for music. And this demonstrates that CBS has failed

* Even worse, CBS proposes that the court-fixed rates be adjusted to reflect prices reached in direct licensing transactions. The ceiling effect of the per-use rate would guarantee that direct transactions would take place only at prices below the per-use rate. In this way, CBS would hope to drive the ceiling lower and lower and lower (see pp. 160-62).

to sustain its additional burden of proving that the system it demands would increase competition. The present system allows for direct licensing of performance rights in a market in which prices are allowed to move in either direction. The per-use system would place an up-side limit on competition. From the testimony of those CBS witnesses who endorsed the per-use system, it can only be concluded that this limiting effect on competition is precisely what CBS hopes to achieve (see pp. 170-74).

The CBS proposal for an injunction prohibiting BMI and ASCAP from licensing television networks* has absolutely no redeeming values. The blanket license alternative presently available has proven to be of immense value to the program producer and to the public. The blanket license affords immediate and certain access to vast numbers of compositions at low cost. The producer has complete creative flexibility to present to the public the best music for his program available anywhere.**

CBS' injunction request seeks to deprive the other television networks of blanket and per program licenses as sources for performance rights. The elimination of sources of supply is completely inconsistent with the goals of the antitrust laws, and is contrary to the public interest. The admitted purpose of CBS' injunction proposal is to limit the competition between CTN and the other two television networks, even at the acknowledged expense of lowering the quality of television programming for the public. To seek court sanction for the elimination of competition is to make a mockery of the Sherman Act (see pp. 175-80).

Finally, the per-use system proposed by CBS, necessitating constant rate adjustments and adjudications as to use classifications, would place an unconscionable burden on the Court (see pp. 181-88).

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* Although CBS describes the injunction proposal as an "alternative" in case per-use is rejected, the injunction proposal in fact includes a good measure of per-use licensing: CBS would enjoin the licensing organizations from licensing networks, except would require them to license spontaneous and unplanned use as well as music "in the can", on a per-use basis (see Plaintiff's Findings p. 126, Post-Trial Brief p. 2).

** The per program license also has these advantages.

ARGUMENT

I.

CBS HAS NOT SUSTAINED ITS BURDEN OF PROVING THAT THE OFFERING OF BLANKET LICENSES RESTRAINS TRADE IN THE MARKET FOR MUSIC PERFORMANCE RIGHTS FOR NETWORK TELEVISION PROGRAMS.

CBS has attempted to squeeze this case into three "per se pigeonholes". It claims that there has been (or will be) (or might be yearned for) a concerted refusal by writers and publishers to deal directly with CTN for performance licenses; it claims that, by granting rights to BMI or ASCAP to grant performance licenses, writers and publishers have fixed prices; and it claims that the licenses offered by BMI and ASCAP constitute unlawful tie-ins.

The record shows that there are alternatives to the blanket licenses which CBS has chosen. Per program licenses are available from the performing rights organizations, and direct licenses are available from writers and publishers. The authorities establish that on these facts the defendants have not violated the antitrust laws. The proven existence of suitable alternatives—both in terms of a duality of sources for obtaining the identical composition and in terms of a multiplicity of sources for satisfactory substitute compositions—precludes a finding that CBS has been compelled in restraint of trade.

A. The Record Shows That Realistic Alternatives To Blanket Licenses Are Available.

In this action CBS has complained of two problems: (1) that it has been required to pay royalties for network television programs that used no music; and (2) that it has been required to pay the same royalties for a program that used a few seconds of one composition as for a program that used many minutes of many compositions.

In response, the defendants have pointed out that the existing licensing system provides a range of alternative licensing methods that would give CBS complete flexibility to meet any type of licensing need. Performance licenses could be obtained directly from the writers or publishers of the music for almost all, if not all, of CTN's programs. For the small number of programs that use large quantities of music and whose production schedules are short, a per program license is available. A per program license is also insurance against liability for unanticipated music uses which, by their nature, cannot be licensed directly. And finally a blanket license is available if CTN wishes to avoid the efforts and transaction costs of acquiring music on a piecemeal basis.

Analysis of the nature and sources of the music used on CTN programs shows that CTN has practical alternatives to blanket licensing. Further, the evidence presented in this case shows that there are no mechanical or motivational obstacles which would prevent copyright owners from granting performance licenses directly to CTN.

1. The Nature of Network Television Music Use

There can be no intelligent discussion of the alternatives to blanket licensing without an understanding of the nature of the music used on CBS' Television Network. CBS' brief and proposed findings are quite silent on this subject. While CBS cites a few impressive-sounding, but factually unrevealing, numbers (Plaintiff's Findings p. 36), it has avoided discussing the nature of the network's actual music needs.

From the evidence presented by CBS at trial one might have thought that the vast bulk of CTN programs were variety programs. CBS produced only three witnesses connected with production of CTN programs, Robert Wright of The Carol Burnett Show, Edward "Duke" Vincent of the Jim Nabors Show and George Sunga who works on musical variety specials. These three witnesses were apparently supposed to show that direct licensing is

impracticable for CTN. But CBS asked these witnesses about the procedures, operations and problems only of the musical variety shows. Although Vincent had been on the production staffs of shows other than variety shows (Tr. 571-72), CBS limited its questions strictly to musical variety show problems (see, *e.g.*, Tr. 623).

Everyone knows that CBS has few variety programs on the air, yet CBS presented no testimony or documentary evidence as to the music needs of CTN's other programs. And the witnesses employed by CBS displayed a surprising lack of knowledge in that area. Donald Sipes, then CTN's vice president in charge of business affairs and planning, was "just generally aware" that the non-variety programs hire people to compose music (Tr. 213). Irwin Segelstein, then CTN's vice president in charge of program administration, had no idea at all what proportion of CTN's programs used music that had been specially created for the program (Tr. 2040).

CBS did introduce what purports to be a music use study, but it gives an incomplete and rather distorted picture because it omits all CTN daytime programs and all programs not using music (PX 835-PX 837). Fortunately, however, there is sufficient information in the record to permit a more meaningful analysis of CTN music use than CBS has provided.

Preliminarily, it will be helpful to review the kinds and sources of network music. There are three basic ways in which music is used on network television—as feature music, as theme music, and as background music. Theme music is the music used to introduce and to close a program (Sipes Tr. 212). Ordinarily, theme music is specially composed for the program (Chiantia Tr. 2860, 2867; Dann Tr. 3250-51). Typically, the theme music is published by a publisher owned by the program producer or by the special music composer hired for the program (Vincent Tr. 664-66, 700-01).

Feature music is described in the BMI payment schedule as music which is "the main focus of audience attention"

(PX 469). A classic example of a feature use would be a performer singing a song on-camera. Ordinarily, music used as feature is previously published music, rather than music composed especially for the program (Dann Tr. 3251). In some cases, particularly with respect to motion pictures, the feature music used is published by the program producers (Chiantia Dep. 42-44, 46-47). More often, it is controlled by a publisher not connected with the program (Dann Tr. 3251).

Background music, sometimes also called "incidental music", is music used as background to the action on the screen (Marks Tr. 2491; see generally Green Tr. 3447-50). There are two distinctly different kinds of music which can be used as background. Occasionally ordinary, identifiable compositions capable of being performed as features are used as the background for action on the screen. An example given at trial was "Tea For Two" used as background to a tea party scene (Marks Tr. 2494-95). More often, the music used as background is specifically composed as background music to introduce and underline the action on the screen (see generally Green Tr. 3447-50). In such cases it is ordinarily published by the program producer or by the special music composer hired for the program* (Marks Tr. 2495; Dann Tr. 3250-51, 3279; Wright Tr. 489-90, 495; Vincent Tr. 664-66, 700-01; Chiantia Tr. 2858-60, 2867; Shulman Tr. 3084; Chiantia Dep. 44-51. With respect to motion pictures, see also Coleman Dep. 33; Washington Dep. 9; Morris Dep. 45).

For purposes of evaluating what would be involved in direct licensing of music for CTN programs, all of the music used on CTN may be divided into two categories according to the source of the music. Feature-type compositions controlled by publishers not connected with the program, regardless of whether they are used as feature or used as background, fall into one category; all other music

* It is possible to obtain "canned" or "stock" background music of this second type from background music services or libraries instead of having music specially composed (*cf.* Preston Tr. 1869-71). However, there was no testimony that any CTN programs use canned music.

is in the other. For want of a better term, music in the first category will be referred to as "identifiable music of outside publishers."

The period for which the record permits the most complete analysis of the nature of CTN music use is the first quarter of 1972. CBS has introduced schedules of CTN's regular programs and specials for that period (PX 541, PX546), and ASCAP has introduced computer records of ASCAP music used on CTN during that period (AX 287, AX160(a)-(q)).

In general, the analysis of ASCAP's computer runs (AX287, AX160(a)-(q)) reveals music use patterns that reflect the nature of the programming. CTN's news and public affairs programs ordinarily used no music at all (see also Stanton Dep. 140-42). The staple situation comedy, crime, and drama series, which make up so much of the network programming, ordinarily used only specially composed theme and background music. And although identifiable music of outside publishers has cropped up occasionally on almost every kind of show, it is used regularly only on a very small group of programs: variety shows, variety specials, sports shows, late night talk shows and the Captain Kangaroo show.

In the first quarter of 1972, CBS telecast some 1890 programs (see PX 541, PX 546). The number of programs which used no ASCAP music at all is surprisingly large: 541 programs, or 28.6%, used no ASCAP music.* Also surprising is how few programs used identifiable ASCAP music of outside publishers. Only 314 programs, or 16.4%, used identifiable music of outside publishers.* Of these, a large number —129— used the music of only one outside publisher.* This means that only 185 of CTN's 1890 programs, or 9.8%, used identifiable music from more than one outside publisher.*

Further analysis of AX287 and AX160(a)-(q) reveals that of the 185 programs that included identifiable music of more than one outside publisher, most of those programs

* Not revealed by the evidence presented by CBS.

used music of no more than a handful of such publishers. Thus 118 of the CTN programs, or 6.1%, used identifiable music of between two and six outside publishers.

In summary, therefore, CTN programs exhibit the following music usage pattern:

Proportion of Programs	ASCAP Music, by source
28.6%	None used
9.3%	All owned by CBS
45.5%	Include no identifiable music of outside publishers
6.8%	Include identifiable music of one outside publisher
6.1%	Include identifiable music of between two and six outside publishers
3.7%	Include identifiable music of seven or more outside publishers
100.0%	

Thus at a time when CTN had more variety shows than it has now,* and a late night talk show which it lacks now, *more than 90% of its programs could have been licensed without the need to obtain a license from more than one outside publisher.* And for 96.3% of the CTN programs the music could have been licensed without obtaining licenses from more than six outside publishers.

Clearly, then, the nature of music use on almost all CTN programs is such that direct licensing would present no

* Fred Silverman, the CBS rebuttal witness called to testify to CBS' efforts to put more variety shows on the air, described his plans to consider such talents as Elaine Joyce, Cass Elliot, the Hudson Brothers and Lily Tomlin as variety show hosts or hostesses, and expressed confidence that the 500 Ramada Inns would prove a source of new variety talent (Tr. 4739-44, 4752). Apparently the Ramada Inns did not produce a bumper crop of variety talent this year. Not only did CBS drop one of its two prime time variety shows, NBC has dropped all three of its prime time variety programs (see Broadcasting Magazine, April 15, 1974, p. 62 and April 22, 1974, p. 4).

mechanical problems. Even as to the 3.7% of the CTN programs which use music of seven or more outside publishers, there is no evidence that it would not be feasible for the producers of these programs to obtain performance rights directly from the copyright owners. However, if the producers could not license directly on these few programs, they could utilize the available BMI and ASCAP per program licenses.

2. Per Program Licenses

Having no real answer to the point that it could meet its needs with a combination of direct and per program licenses, CBS has buried its discussion of per program licenses in its proposed findings. Upon distilling CBS' convoluted analysis of the subject, it appears that CBS makes six arguments as to why a combination of direct and per program licenses would not provide an alternative to blanket licensing. Each will be dealt with in turn.

(1) *CBS' claim that the terms of a per program license would not permit CTN to avoid a per program fee by direct licensing (Plaintiff's Finding 80):* This claim rests entirely upon speculation—and the reason we have only speculation rather than fact is wholly the fault of CBS. Both ASCAP and BMI are required to offer per program licenses to CBS upon request. But CBS has never sought to negotiate with ASCAP or BMI for a per program license for CTN (Sipes Tr. 180, 255-56, 369). In that neither of the other networks has ever held a per program license, any per program license terms that might be negotiated between a performing rights organization and a television network are purely a matter of guesswork.

CBS' position depends entirely upon the unsupportable assumption that all of the terms of the per program license negotiated between ASCAP and an All Industry Committee of owners of television stations would be non-negotiable demands on ASCAP's part in any bargaining with a television network for a per program license. One term of this

local television form provides that the licensee can avoid paying a per program fee by direct licensing of music used in motion pictures or in programs presented by electrical transcription if the consent of both writer and publisher is obtained and seven days' notice of the direct license is given to ASCAP (CX2, Ex. 14, ¶ 4).

To be sure, this local station per program license does place some restrictions on the licensee's ability to avoid payment of the per program fee by obtaining direct licenses. That does not mean, however, that ASCAP would not have agreed to fewer restrictions in exchange for concessions on other terms. On their part, the local stations may well have preferred to give up some opportunities to avoid the per program fee by licensing directly, in order, for example, to obtain a lower per program fee. This is just one of the many terms that has to be worked out between the parties in negotiations. There is nothing in the record to indicate that the performing rights organizations would refuse in principle to bargain for per program licenses under which no fee would be payable if all music on a program were licensed directly.

The terms of this local station license did not spring fully formed from the brow of Herman Finkelstein as an inflexible ASCAP demand. Rather, the terms of this license—and the terms of the local station blanket license—were bargained out between ASCAP and the All Industry Committee of broadcasters* (Marks Tr. 2429, 2693-97). The same is true of BMI's license forms (Cramer Tr. 4254-55).

These terms represent the net effect of the give and take in the negotiations between the parties. Terms reached by the performing rights organizations with the networks for blanket licenses in the past have been different from the blanket license terms reached with local stations (compare PX 19 with CX 2, Ex. 14); doubtless if a network were to negotiate for a per program license, the terms agreed upon

* This of course explains the similarity in the terms of the blanket and per program contracts which CBS makes so much of (Plaintiff's Finding 79).

would differ from the terms in the station per program license.

At deposition, CBS' counsel attempted to debate the merits of various terms in the station per program license with ASCAP economist Paul Fagan. Fagan's response to this effort makes the point:

> "As I said before, that is the agreement they reached. It is not an imposition on the licensee. It is something he agreed to." (Dep. 473)

There is absolutely no basis for assuming that the provisions of the station per program licenses would be insisted upon by ASCAP in negotiating with television networks for per program licenses.*

The only thing that can be assumed with confidence is that ASCAP would have to offer a per program license which complied with the requirements of its consent decree. The consent decree does not define the per program license in great detail (CX 2, Ex. 10). The decree does, however, require that ASCAP permit its members to license their compositions directly. Section IV(B) of the decree (CX 2, Ex. 10), prohibits ASCAP from "Limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performances". As CBS has to concede, it has an argument under the consent decree that ASCAP could not require any payment under a per program license with respect to a program whose music had been licensed directly (Plaintiff's Findings p. 108). Having never even inquired as to what terms ASCAP would offer, CBS cannot sustain its position that per program fees could not be avoided by direct licensing.

(2) *CBS' argument that direct licensing in order to avoid the payment of a per program fee would be artifici-*

* If CBS could not persuade ASCAP to give it credit for such direct licenses, perhaps CBS could simply resort to the expedient of requiring the program packager or other copyright proprietor to "kick back" to CBS all or some of the proceeds received from ASCAP in respect of CTN performances. This is what CBS does today in contracts with composers hired to write special music for programs produced by CBS (*e.g.*, BX 214, BX 215B).

ally expensive because copyright proprietors would tend to hold out for a fee slightly under the per program rate (Plaintiff's Finding 81): CBS' scenario is that the copyright owner approached for a direct license would know (a) the number of songs the producer intended to use and (b) the per program fee; he would divide the number of songs into the per program fee to determine the "share" for each song and would hold out for slightly less than that "share". This argument does not make sense, either factually or logically. In the first place, the per program rate cannot have the effect of inflating direct license prices; it can only place a ceiling on them. Furthermore, even assuming that there was any theoretical validity to the argument, the copyright owner as a matter of fact simply would not have enough information to know his "share" of the per program fee and therefore would not be in a position to demand it.

The existence of a per program license logically could only lower prices in direct licensing transactions; it could not raise them. Let us assume first that the copyright owner of a particular song is approached for a direct license for a particular program. The natural limit on the price he can command is the price at which a less expensive piece of music would be substituted for his song. If there were no per program license, this substitution price would be the only control on the price the owner could command.

Assume now that CTN has a per program license. To the extent that there are substitutable songs available at prices below the per program fee, those prices will prevent the publisher from "holding out" for the program fee* And in the rare case in which no substitutable song is available at a price below the per program fee, the per program fee benefits CBS by placing a ceiling on what the copyright proprietor would otherwise be in a position to charge. Thus, the per program rate cannot act to increase direct license prices, it can only act as a ceiling on them.

* Or, if more than one song is to be used, the availability of substitutable songs at prices below the "share" of the per program fee will prevent him from holding out for the "share".

The fundamental error in CBS' analysis is that it ignores the fact that the copyright proprietor is competing against the prices for all substitutable songs. In the normal case where there are substitutable songs below the per program rate, it is their availability that will limit what the copyright proprietor can charge, and prevent him from "holding out" for the per program rate. And in the rare case in which there is no substitutable song priced below the per program rate, the per program rate *helps* the producer by acting as a ceiling on the price the copyright proprietor might otherwise have asked.

As well as being without basis in logic, CBS' argument as to the alleged inflationary effect of the per program rate rests on fundamental errors of fact. In advancing the CBS argument, Professor Fisher postulated that the copyright owner would have sufficient information to calculate his "share" of the per program rate (Tr. 1717). This assumption is contradicted by the record.

To begin with, the publisher would have to know the number of songs that the producer intended to use in order to determine his "share" of the per program fee. CBS makes the unsupported assertion that the publisher could make this calculation because the number of songs used "varies within a relatively narrow range" (Plaintiff's Findings p. 109). This simply is not so. For example, during the first quarter of 1972, the number of ASCAP feature uses per episode varied on The Carol Burnett Show by 2700%, on Captain Kangaroo by more than 600%, on the Glen Campbell Show by 800%, and on the Merv Griffin Show by 1700% (AX 286; PX 541). With these kinds of variations, a music publisher could have no idea what percentage of the total program requirements his song represented.*

* Furthermore, it is unlikely that the publisher would know the per program fee. Under the percentage-of-receipts form of per program license—the only kind ever negotiated—the fee cannot be determined until after the program is broadcast. At the time of music selection and production, the per program fee would not be known. *(Footnote continued on next page.)*

(3) *CBS' argument that it would be impossible to save money by using a combination of direct licenses and per program licenses instead of a blanket license (Plaintiff's Findings pp. 108-10):* CBS' purported demonstration of this proposition is flawed by a sophistical assumption.

In its Findings, CBS cites a calculation of Professor Fisher's to conclude that CBS could not save money on a combination of direct and per program licenses no matter how many times CBS avoided paying the per program rate by obtaining direct licenses (Plaintiff's Findings p. 110). The determination as to whether using a combination of direct and per program licenses can result in CBS' paying royalties that are lower than the blanket license royalty is logically a function of several variables: the percentage of CTN programs using no ASCAP music, the percentage of programs for which direct licenses could be obtained, and the relative relationships between rates for the blanket, per program and direct licenses.

Professor Fisher developed a formula for determining at what point a combination of direct and per program royalties would be lower than the blanket license royalty. This formula is $PP(1 - Y - Z) + D(Y) = B$, in which PP is the per program rate, B is the blanket rate, D is the direct licensing cost, and Z is the percentage of programs using no ASCAP music. If this equation is solved for Y, the percentage of programs which would have to be licensed directly for a combination of per program and direct licenses to "break even" with a blanket license is determined. The result, of course, depends on what figures are assumed for PP, B, D and Z.

In the calculation on which CBS now relies, Professor Fisher was asked to assume a per program rate of 4.5%,

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(Continued from previous page.)

There is also no basis for Professor Fisher's assumption (Tr. 1717) that each seller with respect to any given program will tend to be conscious of what the other sellers are likely to do. The publisher who is contacted by a producer for a license on one of his songs will have no idea at all which of the hundreds of thousands of other available songs the producer may also be seeking, or which of the numerous other publishers he will call. Nothing in the record even suggests that the publisher would have access to that kind of information.

a blanket rate of 2%, and a direct license cost of 3%. On these assumptions, Professor Fisher used his formula to conclude that so long as more than two-thirds of CTN programs used ASCAP music, there was no way in which CBS could possibly save money with a combination of direct and per program licenses. Given these assumptions, the conclusion is inescapable, for 4½ and 3 are both greater than 2. But because of these assumptions the calculation is no more than a charade.

The fallacy, of course, lies in the assumption of a royalty rate for direct licenses that is higher than the blanket license rate. CBS' entire thesis in this litigation is that blanket licenses inflate the cost of music, and that CTN could license directly for far less than the cost of the blanket licenses. If it is to be assumed as true that performance rights cannot be licensed directly at a royalty rate lower than the blanket license rate, then the offering of blanket licenses cannot have injured CBS or posed a threat of injury, and this case must be dismissed. Thus, CBS' assumption of a direct licensing cost (3%), which is fifty per cent higher than the blanket license fee (2%), squarely contradicts CBS' basic assumption in this case.

At trial, Professor Fisher also employed his formula to calculate the "break even" point using assumptions which *are* consistent with CBS' basic premise in the case (PX882, PX882A). However, CBS nowhere refers to these other calculations in its findings—undoubtedly because they completely refute CBS' argument that it could not save money using a combination of direct and per program licenses.

Because the record now provides a real figure for one of the variables as to which Professor Fisher only made assumptions, Professor Fisher's calculations at trial will not be repeated here. Instead, using his formula, the results will be recalculated on the basis of this real figure and Professor Fisher's assumptions as to the other variables.

CBS' music studies introduced at trial omitted any data from which one of the variables in the formula—the percentage of programs using no ASCAP music—could be

computed. Professor Fisher therefore performed a number of calculations making various assumptions as to the percentage of programs using no ASCAP music; these assumed percentages ranged from 0 to 30 per cent. In fact, there are documents in the record from which an exact percentage can be calculated for one calendar quarter of CTN programming: CTN's program schedules (PX 541 and PX [illegible]) and ASCAP's computer records of CTN's music use during the first quarter of 1972 (AX287, AX160(a)-(q)). In that quarter, 28.6% of CTN's programs used no ASCAP music.

One set of calculations by Dr. Fisher which CBS now ignores assumed a 4.5% per program rate, a 2% blanket rate, and a 1% direct licensing rate (see PX 882A). These assumptions are consistent with CBS' thesis in this action that direct licensing would be cheaper than blanket licensing. Using these assumptions and using the figure 28.6 as the percentage of CTN programs using no ASCAP music, Professor Fisher's formula reveals that CTN could save money on performance royalties if it could obtain direct licenses for any more than 34.7% of its programs. This would be child's play: as discussed in greater detail in the section on the nature of CTN's music use, almost 55% of CTN's programs use only music owned by CBS, or the program producer, or the special music composer connected with the program. CBS could direct license these uses without taking a deep breath.

In PX 882A, Professor Fisher assumed a 4.5 to 2 ratio between the per program and blanket rates. Of course, since neither ASCAP nor BMI has ever quoted a per program fee for a television network, there is no foundation in the record for assuming any particular rate. CBS has asserted, without any support, that ASCAP and BMI would insist on having the same ratio for the networks as the existing ratios between the per program fees and blanket fees in the local television station contracts nego-

tiated with the All Industry Committee (Tr. 1709-13).* This ratio would be 9 to 2—twice the disparity assumed in the formula in PX 822A.

Professor Fisher also performed calculations using this assumed 9% per program royalty figure, together with the 2% blanket and 1% direct license assumptions previously used (see PX 882). Again, since Professor Fisher had no evidence as to what percentage of CTN programs use no ASCAP music, he performed calculations using different assumptions as to that figure. Using Professor Fisher's assumptions as to the license fee rates and using 28.6%, the figure developed by the record, as the percentage of programs using no ASCAP music, the Professor's formula indicates that CBS could save money on royalties, even with a 9 to 2 disparity between the blanket and per program rates, if it licensed directly any more than 55.3% of CTN programs. Since 54.8% of CTN programs use only CBS music or music published by someone connected with the program, CTN could save money, on these assumptions, if it direct-licensed these programs and a mere handful of the programs using identifiable music of outside publishers.

Thus, when the portions of Professor Fisher's calculations not referred to by CBS are examined, they show that it would be perfectly possible for CBS to pay lower royalties using a combination of direct and per program licenses.

(4) *CBS' argument that direct licensing to avoid payment of a per program fee would result in a waste of money every time the effort proved unsuccessful* (*Plaintiff's*

* The increased monitoring expense involved in a per program license would not be appreciably different for a station or a network, but this expense as a percenage of license fees would be smaller in the case of a network since network fees are much higher. This suggests that the per-program-blanket ratio for networks would be smaller than the ratio in the station licenses. On the other hand, a broader provision permitting avoidance of per program fees through direct licensing in a network license than is provided in the station license would tend to drive the ratio higher. There are undoubtedly other business differences in the two situations as well. For these reasons, any suggestion that a particular ratio would be agreed upon could rest only on speculation.

Findings p. 111): Originally, CBS argued that unsuccessful attempts at direct licensing all songs on a program to avoid a per program fee would result in double payment of license fees with respect to those songs where direct deals had been concluded (Sipes Tr. 145-47, 284-85). In the face of evidence destroying this argument, CBS appears to have retreated to the position that there would be money wasted on transactions costs. Because of the extraordinary propensity of discredited arguments in this case to reappear, the argument will be dealt with in both its original and its present form.

Basically, CBS' original scenario was that a producer would spend hundreds of dollars getting direct licenses to four of the five songs he planned to use, but would be unable to make a deal for the fifth one, and would end up having to pay not only a per program fee but the hundreds of dollars for direct licenses as well (Sipes Tr. 145-47, 284-85). That this would not occur is clear from the current methods of licensing motion picture performance and synchronization rights, and television synchronization rights.

A synchronization right is the right to record copyrighted music in connection with a motion picture or television film (Chiantia Tr. 2975-76). Motion picture producers typically acquire synchronization licenses and performance licenses for United States theater performances at the same time (Mingle Tr. 852-53). Often, negotiations for those licenses are carried out through the facilities of the Harry Fox Agency (Berman Tr. 796; Mingle Tr. 858). Miss Mingle, who is in charge of movie rights transactions at Harry Fox, testified that she obtains price quotations from music publishers in response to requests from producers (Tr. 852-53, 858-60). As Miss Mingle made clear, these quotations are in fact options to the producer to take a license at the price quoted. The options are good for 90 days, and most publishers will extend them for another 90 days on request (Tr. 889-90). The producer does not have to pay anything at all unless he actually uses the song; the option is free. And frequently producers do not use all

the songs for which they get quotations (Mingle Tr. 868).

The same situation prevails in the licensing of television synchronization rights. In television, if a program is to be rerun, or is to be syndicated,* a synchronization license is required (Wright Tr. 527-28). Albert Berman, managing director of the Harry Fox Agency, testified that music publishers quote prices for television synchronization rights licenses which are in effect options good for 30 days (Tr. 965-66). Again, producers often obtain quotes on more compositions than they use. And the producer pays nothing unless he actually performs the compositions. Indeed, no payment is made until after the show is telecast. As Robert Wright of The Carol Burnett Show put it,

> "We never pay out on materials that can be physically edited from the show until after the air date, and this is also accepted practice in the industry.
>
> • • •
>
> "Certainly we have a deal. But we are not going to pay it when it is taped • • • [because the show may later have to be cut because of a preemption]. We may cut out a piece of music." (Tr. 506)

If television and motion picture producers are now able to obtain options good for at least thirty days without paying anything, there is no reason to suppose that CBS or its producers could not obtain similar options for performance rights, exercisable if CBS used the music and did not use a per program license for the program. CBS' original argument that unsuccessful attempts to avoid paying per program fees would result in wasted direct license payments just did not withstand exposure to the facts.

CBS now argues that even if performance rights options were available in this market, if CTN did not manage to obtain all of the direct licenses it wanted and had to fall back on the per program license, CTN would have wasted the transaction costs of acquiring those options (Plaintiff's Findings p. 111). This is nonsense. CTN's effort would

* See Glossary: "Syndication".

have been no different from a hi-fi buff's spending a morning going from store to store pricing separate components, and then electing to purchase a complete system at a single price. This is a normal cost of shopping for alternatives, and there is nothing extraordinary or evil about it. CBS itself does it all the time: CBS' witnesses testified time and again that they habitually shop around for the best prices they can get on synchronization rights (*E.g.*, Wright Tr. 409, 429-30a, 468-69; Vincent Tr. 603-06; Sunga Tr. 749). Of course, they incur transactions costs in obtaining price quotations on songs they do not elect to use. However, the whole theory of shopping around is that the resulting savings in price will be greater than the expense of shopping. The cost of the option shopping trip would be simply a normal cost of doing business.

(5) *CBS' argument that reliance on an ASCAP per program license for a given program would discourage the use of BMI music (Plaintiff's Findings p. 112):* This argument ignores the fact that the principal use of the per program license is in situations in which it is not known in advance whether or what music will be performed. Situations in which a user would choose in advance to pay a per program fee to a particular performing rights organization would be rare. To be sure, in such a situation a user which had chosen in advance to pay a per program fee to a particular licensing organization would doubtless make some effort to use only music of that organization. This, however, is not an evil. It is competition, the very goal of the antitrust laws.

(6) *CBS' assertion that the per program fee is "totally arbitrary" because it does not vary in accordance with how much music is used* (Plaintiff's Findings pp. 112-13):* This simplistic assertion rests primarily on CBS' misconception of the nature of the commodity bundle acquired in a per program license.

* Of course, general levels of music usage will certainly enter into the bargaining over the amount of the per program fee. (Cf. Cramer Tr. 4291 regarding music usage as a factor in blanket license negotiations.)

To begin with, however, it is not accurate to say that the payment under a per program license does not vary with use, for payment depends on use. The per program license covers all programs; but only after the program is telecast is a determination made as to whether a fee is payable. If music was used, the fee is payable; if music was not used, no payment is required.

A per program license finds its principal utility in situations in which it is not known in advance what compositions will be performed. The primary value of the license is the comprehensive protection it affords against infringement of the copyrights on the hundreds of thousands of compositions covered by the license. Even though it might turn out that a licensee performed only one song, it wanted, needed and should pay for, the right to use all of the others.

This protection is valuable to the licensor in respect of every program broadcast, even though he will not be required to make any payment at all as to some. To the extent that there is any unfairness in the per program fee arrangements, it lies in this requirement that no charge be made for those programs which it turns out afterwards happen not to have used music.*

While neither party may find it preferable because of the increased administrative costs, a per program license could be negotiated to take some account of use. Indeed, this has been done. Under the BMI single television station per program license, payment does vary with use (PX438). The BMI local per program rate is ordinarily 4% for each sponsored program, but the rate is only 2% if

> (a) the only BMI music used is (1) theme and/or (2) background music which does not last longer than five minutes per half hour; or

*In considering the provisions of the ASCAP and BMI consent decrees, it must be kept in mind that these provisions were framed in light of the fact that almost all licensees of the performing rights organizations are unable economically to license their music directly. If the only licensees of ASCAP and BMI were television networks, much less restrictive decree provisions would be appropriate. Rather than not going far enough, the decree provisions go too far insofar as the television networks are concerned.

(b) the only BMI music used is BMI arrangements of public domain works on which BMI makes no distribution to affiliates; or

(c) the only BMI music used is music used incidentally to the telecast of a public event or a sports event.

Like any other term of the license, the degree to which the quantity or quality of use should affect the amount of the fee is just one of those things which has to be worked out between the parties.

The fundamental deficiency in CBS' arguments is that they are not soundly anchored in fact. They depend on unreliable speculation as to what terms of per program license would be negotiated, they depend on assumptions as to the network's music usage patterns which are contradicted by the record, and they depend on inaccurate suppositions as to the nature and sources of that music. These are the liabilities of trying to prove that a course not tried would fail, and undertaking that burden of proof without prior investigation as to whether it could succeed.

3. Dealing Directly With Copyright Proprietors

In an attempt to show that the present system of music licensing possibilities does not provide it with adequate alternatives for acquiring performance licenses, CBS has, over the duration of this case, concocted an array of reasons why it could not cope with a licensing operation that depends in whole or in part on obtaining licenses directly from the copyright proprietors.

For example, CBS argues that its producers would not know where to find the copyright owners, that clauses requiring the writer's consent to direct performance licenses would obstruct direct dealings, and that writers and publishers either would refuse to grant CTN direct licenses or would hold CBS up for exorbitant prices for music "in the can". Each of CBS' arguments is demonstrably specious.

(a) There is no "mechanical" inaccessibility

Two of CBS' arguments deal with the mechanics of obtaining direct performance licenses: the need for CTN producers to identify and locate the copyright owners, and the need of the copyright owners to obtain the consent of the writers. Neither requirement supports CBS' contention that it would obstruct direct licensing.

(1) *CBS knows who and where the publishers are.*

One of the earliest facts established at trial was that CTN and its producers would have no difficulty in identifying and locating the copyright proprietors of the music used on CTN programs. The reason is an obvious one: CTN producers are already dealing with those people.

To begin with, most of the music used on CTN programs is created especially for the program by writers hired for that purpose (Dann Tr. 3250-51). Producers contact composers to order special background and theme music, and occasionally even feature music. The producers obviously know who and where these composers are—they hire them.

Thus, CBS' counsel has stated that as to the specially created music,

> "• • • there is no reason in the world why the producer at the time he negotiates with the composer, why he can't negotiate for a performing rights license to CBS. • • •" (Transcript, July 10, 1970, p. 50)

As to already published music the CTN producers would have no greater difficulty: they already deal with the publishers of such music for synchronization rights. Synchronization licenses are required for all network programs which are to be rerun or syndicated (Wright Tr. 527-28). Since any program on film or tape is likely to be rerun (see Dann Tr. 3246—a single season might consist of more reruns than original shows), CTN program packagers always obtain synchronization rights to the music in their programs (Sipes Tr. 22; Hruska Tr. 23-24).

The producer witnesses who testified for CBS stated that they use the services of Bernard Brody or Mary Williams to obtain synchronization licenses for their shows (Wright Tr. 424-26; Vincent Tr. 602). Brody and Williams either contact the publishers directly or work through the Harry Fox Agency which contacts the publishers (Wright Tr. 424-26; Vincent Tr. 602-03; Sunga Tr. 747-48).

Robert Wright, who is on the production staff of The Carol Burnett Show, testified that problems in clearing synchronization rights have been "rare", and that there have been no major problems (Tr. 478-79, 527). Edward "Duke" Vincent, who had been on the production staff of the Jim Nabors Variety Hour, testified that Bernie Brody would have no difficulty in giving him the names and addresses of, or putting him in touch with, any copyright owner (Tr. 686-87).

Hence, CTN Vice President Donald Sipes was forced to admit that the channels of communication between producers and copyright proprietors are already open (Sipes Tr. 199-201). As Professor Fisher put it, "The phone calls get made anyway in order to secure the synchronization rights" (Tr. 4776).

Even if CTN producers were not already obtaining synchronization licenses there would be a variety of ways in which they could identify and locate the publishers of the music they want to use. For example, for more than seventeen years CBS itself has maintained a file of index cards containing the titles, authors and publishers of more than 100,000 compositions (Poklitar Dep. 24-25, 274). The identity of the copyright owner is also found on the sheet music for a composition (Wright Tr. 478). In addition, many publishers regularly send television producers demonstration records, catalogues, brochures, and other material to promote their music (Wright Tr. 417-18, 492. See pp. 93-97 below). And if it were a question of identifying the owner of a song that a guest star wanted to sing, the producers would simply ask the star "who wrote it, who owns the copyright, and where did you find it, and call those people."

(Vincent Tr. 624) Indeed, many times the owner would be the performer himself (*Id.*).

Obviously, contacting the publishers would present no problem to CTN or its producers.

(2) *Writer consent clauses would not prevent direct licensing.*

CBS argues that an attempt to obtain direct licenses would not succeed because of the difficulties and delays caused by the requirement in certain writer-publisher contracts that writer consent be obtained to direct licenses. The evidence reveals, however, that such clauses would not obstruct direct licensing because (a) only a fraction of writer contracts require the writer's consent, and from all indications that percentage is decreasing; (b) although the same kind of consent is required for many television and motion picture synchronization licenses today, these license transactions are regularly concluded without delay; (c) there is reason to believe that in many cases where consent would be required, blanket authorization in advance could be arranged; and (d) in any event there is every reason to suppose that writers would be willing to give consents promptly.

First of all, the writer consent provision appears in the Amercian Guild of Authors and Composers ("AGAC") form contract, which is hardly ubiquitous; there are hundreds of thousands of compositions not subject to the AGAC contract. For example, any song placed with a publisher prior to the formation of AGAC in 1931 would not be under an AGAC contract (3MPX 31; Brettler Dep. 161). And as the record indicates, most of the later music is not covered by it.

The AGAC form is used only with AGAC members or with an occasional writer who has unusual bargaining power (see, *e.g.*, Chiantia Dep. 12-13; Tr. 2979). Fewer than 8% of the writers associated with BMI or ASCAP are members of AGAC (Marks Tr. 2407-08; PX461; PX441). While it is probably true that AGAC members represent a

somewhat higher proportion of the more important writers, it appears that most of the songs in the catalogs of publishers who testified in this action are not under AGAC contracts (Dean Tr. 1836-36(a); Brettler Dep. 159. Cf. Herman Dep. 9-10; Brackman Dep. 41-42). And the already low AGAC percentage is declining. For example, Salvatore Chiantia testified that the new writers signed by MCA Music in the past five or six years have been essentially non-AGAC (Tr. 2974), and Alan Shulman testified that Belwin Mills Music has signed only one AGAC contract in the past three years (Tr. 3073; see also Chiantia Tr. 2882-83). The decline of the AGAC form contract seems to be due principally to the fact that most of today's young writers are not members of AGAC (Shulman Tr. 3074), and the fact that the AGAC contract does not cover the renewal term of copyright, so that as songs go into the renewal term, they are acquired by publishers on other contract terms (Shulman Tr. 3100-01; Brettler Dep. 159).

For the relatively small percentage of writers who do have AGAC form contracts, there are two types of licenses commonly issued today for which publishers are required to obtain the writer's consent. These are synchronization licenses for television uses of songs more than ten years old, and synchronization licenses for vocal use of songs in motion pictures (3MPX31, ¶ 4(l)(iv), (v)). It is clear from the record that the writer consent requirements ordinarily have caused no delay in concluding these transactions.

Albert Berman, managing director of the Harry Fox Agency, testified at trial that it takes from a few minutes to a few days at most to supply a quotation for television synchronization rights to a producer (Tr. 921-22, 924). CBS itself has had to acquire synchronization rights on a number of occasions, and there is no evidence that it has ever had any difficulty in doing so (Poklitar Dep. 235-45). CBS witness Robert Wright testified that ordinarily Bernard Brody is able to obtain synchronization rights for the Carol Burnett show within two days, and that Brody only occasionally needs a third day (Tr. 424-25). Problems

in clearing synchronization rights for Carol Burnett are rare, and there have been no major problems (Wright Tr. 478-89, 527).

It might be argued that the prospect of performance royalties makes copyright proprietors complaisant in television synchronization negotiations, so that the dynamics of television synchronization negotiations are not comparable to those which would surround direct negotiations for television performance rights (cf. Fisher Tr. 1676-80). However, for motion pictures, synchronization and performance licenses are directly negotiated together, and the dynamics of these transactions are not appreciably different (Mingle Tr. 852-53). As with television synchronization quotations, quotations for motion picture synchronization and performance fees are supplied quite promptly. Miss Mingle of the Harry Fox Agency testified that she is reasonably well able to provide responses from publishers to requests for quotations from the major studios "within a few days," and likes to do it within two days (Tr. 868, 866).

In part, the licensing of synchronization rights to songs under an AGAC form contract has been "automated" through writers' giving their publishers blanket authorizations in advance, either formally or informally, to license such rights (*e.g.*, Chiantia Tr. 2973; Brettler Dep. 161-62, 499-502). The reasons why writers have chosen to give such consent in advance are that they most eagerly want their music to be used, and they do not want to risk non-use through the delay that insistence on use-by-use consents might entail. Thus Salvatore Chiantia explained in a letter to AGAC concerning consents for background uses:

> "• • • if we are not able to give licenses to TV film producers at $25. per film, or if we have to obtain the written consent of each writer for each individual use, we would for all practical purposes never get the compositions from our catalogs into current TV films other than in a few rare instances. *The writers who have given us their approval are aware of the competitive situation which exists in connection with the use of music in the filmed TV programs produced in*

> *Hollywood. It is because of that very reason that they gave us their okay to go ahead.*" (PX84; emphasis added.)

Similarly, Louis Bernstein of Shapiro Bernstein & Co. wrote AGAC as follows:

> "• • • Please bear in mind that the *authors and composers who come into our office are desperately hungry for performances,* which means money from ASCAP. *A good number of writers have urged us to get them these performances and stop worrying about the AGAC technicalities.* Even so, *19 out of 20 writers would gladly give us any authorization in writing,* but since we are dealing with several thousand writers, it becomes a difficult job to be so technical." (PX162; emphasis added.)

For those writers who have AGAC form contracts and have in no way consented in advance to synchronization licenses, of course, the publisher must contact them for consent. A number of publishers were asked whether they had difficulty in getting in touch with their writers. Chiantia testified that he is routinely able to locate them and reach agreement (Tr. 3059-60); Edwin H. Morris testified he had never had any difficulty in communicating with writers at any time it had been necessary (Dep. 115-16); Jerry Vogel said he had never had any trouble (Dep. 35); and Leon Brettler said he had had difficulties, but if he had to get a writer's written consent he could do it in one day if the writer was in New York, or in "a couple of days" if he had to use the mails (Dep. 182-86). Thus what the record shows is exactly what one would expect to be true: reaching the writers is usually easy, but sometimes it is not.* Regard-

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* If there were writers with contracts requiring their consent who were both insistent on being consulted on each license and difficult to reach, they would find that they could indulge their whims only at a price. Their compositions will be in competition with hundreds of thousands of others as to which consent either will not be required or can readily be obtained. If they persist in being difficult to contact, the same thing will happen to them as happens to Happy Birthday whose synchronization price is so high that "it's never used" (Wright Tr. 428): their songs will be avoided and their revenue and exposure will drop.

less of whether writer consent has been obtained in advance or not, however, the record does not in any way suggest that the requirement to obtain this consent has created any obstacle to the licensing of synchronization rights.

There is, therefore, no reason to infer that the consent requirement, where it exists, would pose any barrier to the direct licensing of performance rights. Thus Chiantia was understandably impatient with the CBS claim that the writer consent requirement would obstruct direct licensing of performance rights:

> "It is no different than the situation with respect to synchronization rights. Why do you have any greater difficulty in this matter than you have in synchronization rights? There are certain synchronizaton rights that you need that I have to get my writer's permission on and you get them. Why suddenly do you have such a great problem in respect of getting performance licenses where you don't have that same problem in getting synchronization licenses?" (Tr. 2970)

There is no doubt that writers are at least as eager today to have their works performed as they were when Messrs. Chiantia and Bernstein wrote the letters to AGAC quoted above. Former CTN Programming Vice President Michael Dann testified that even the most prestigious of composers are "• • • intensely eager to have their works performed on the air as quickly as possible • • •." (Tr. 3276) Composer John Green testified that he wants the exposure for his music, and he recognizes that CTN is "one of the principal outlets in the world for the performance of music • • •." (Tr. 3459) Composers are eager for television network performance because, as BMI President Edward M. Cramer put it, "• • • they are convinced that their product is a good one and all they need is to have it exposed and then people will listen to it and it will become a great success • • •." (Tr. 4285-86)

Thus Dann's view was that regardless of whether or not writer consent was required, "the composer still would react

as aggressively as he can to get his works performed * * *." (Tr. 3373.) And Aaron Copland testified that most composers "* * * will do what is necessary to get the performance * * *." (Tr. 3486)

In view of the limited need to obtain writer consents, the historical acquisition of such consents expeditiously with respect to synchronization licenses, and the obvious motivation for writers to give their consent, it becomes clear that CBS' "writer consent problem" is nothing more than another straw barrier to direct licensing of performance rights.

In sum, therefore, there are no mechanical obstacles in the way of CBS' acquisition of direct licenses for performance rights. As for how, precisely, CBS would go about acquiring such rights, Michael Dann has put the matter into perspective:

> "* * * I have already testified that I know absolutely nothing about existing machinery elsewhere * * *.
>
> * * *
>
> "But if you would like my opinion, I then have to resort to the position that CBS, as probably the largest user of music in the world and with its ability to program television shows which is to create them, put them on the air in living color and bring them into your household to the exact second on 52 weeks a year some 18 hours a day, I would think the problem of dealing directly on music would not be the most challenging that they have ever faced." (Tr. 3421-22)

(b) There is no evidence that the copyright owners would refuse to grant direct licenses.

The alleged "mechanical" inaccessibility, dealt with above, was originally the basic premise of CBS' claim that it could not acquire performance rights directly. Originally there was no suggestion that CBS thought writers and publishers would refuse to deal with CTN. It was only

when it started to become clear that any mechanical problems were easily solved that the claim that copyright owners would refuse to deal with CTN, or would hold CTN up for music "in the can", first made its appearance.

CBS' assertions that writers and publishers would refuse to grant CTN performance licenses directly have no basis in fact. CBS says it has never sought a direct license (Sipes Tr. 155). The three CBS witnesses who opined that writers and publishers would refuse to deal with CBS were CTN vice president Donald Sipes (*e.g.*, Tr. 82-83), CTN producer Robert Wright (*e.g.*, Tr. 465), and Edward "Duke" Vincent* (*e.g.*, Tr. 637-40). None of the three had ever spoken to a writer or publisher on the subject of performance rights licensing (see Sipes Tr. 151; Wright Tr. 513; Vincent Tr. 640, 687-88).

The evidence presented in this case overwhelmingly shows that CBS' speculations are unfounded.

(1) ***A word on standards of proof.***

In attempting to persuade the Court that writers and publishers would refuse to deal directly with CTN if they were asked, CBS' counsel has stated,

> "What we are trying to establish is • • • how a given group of people would react under circumstances which have never occurred." (Tr. 1456)

Since the fundamental circumstances have never occurred, the nature of the questioning in this case has been largely hypothetical. In light of the fact that it is CBS itself that has denied writers and publishers the opportunity to deal directly with CTN, it ill becomes CBS to characterize as "self-serving" their testimony that they would be willing to deal with CTN if CTN asked.

As this Court has said, predicting "what the people will do in a hypothetical circumstance is a dangerous sport." (Transcript, September 14, 1971, p. 61) The risk, however, must be solely on the speculator, and not on the peo-

* Testimony stricken from the record as speculative (Tr. 640).

ple who have been denied the opportunity to react in the real world.

(2) *CBS' speculations are unfounded.*

In attempting to support its speculations as to how writers and publishers "would react under circumstances which have never occurred," CBS has introduced evidence of the Minnesota Mining and Manufacturing Company ("3M") operation which used direct licensing, and has quoted bits and pieces from depositions of a few music publishers. As will be demonstrated below, the 3M operation, far from supporting any inference that there would be a concerted refusal to deal, compels the conclusion that writers and publishers would deal with CTN. Further, when the depositions from which CBS has selected words and phrases are examined in their entirety, they too support the conclusion that writers and publishers would deal. In addition, there is the testimony of the writers and publishers themselves that they would be willing to deal with CTN, supported by evidence of significant objective factors which compel the conclusion that they would deal.

Finally there is surprising evidence, in light of CBS' repeated representations that it has never tried to acquire music performance rights. There is documentary evidence that CTN has in fact sought and obtained direct performance rights to BMI and ASCAP music.

(a) 3M's Acquisition of Direct Licenses

CBS seeks the principal support of its "disinclination" claim in what it ominously refers to as the "3M incident".* CBS gives this name to 3M's experience in seeking performance rights to musical compositions directly from the publishers owning the copyrights. Far from supporting CBS' theory, 3M's experience demonstrates that ASCAP members will readily negotiate directly for performance rights and are willing to enter into any deal which appears sound from a business point of view. Indeed, it is difficult to per-

* *Cf. The Ox Bow Incident; Incident at Vichy.*

ceive why CBS brought the subject up at all, let alone dwelled on it in such excruciating detail.

In the mid-1960's 3M decided to market a tape and player unit called the M-700 which would provide 24 hours of background music (Arrow Tr. 1257, 1263-64). The M-700 was designed for sale to commercial establishments such as restaurants, stores, small factories, and doctors' and dentists' offices (Arrow Tr. 1258). Because the playing of the M-700 by many, if not all, of 3M's prospective customers would constitute public performances for profit under the copyright law, 3M recognized that such customers would need public performance licenses. Accordingly, 3M attempted to obtain licenses for the benefit of its customers which would cover the three-year period after the customer purchased the tape (Arrow Tr. 1265-66, 1270).

3M initially sought public performance licenses from ASCAP (Arrow Tr. 1266-67). During the discussions with ASCAP, a number of problems arose. For example, ASCAP wanted different rates for different classes of customers, wanted all the licenses to commence on the same date rather than having each license commence on the date of purchase, and wanted the right to delete compositions from the license (Arrow Tr. 1269-71). To some extent, ASCAP's positions on these issues were influenced by its consent decree obligations. Paragraph IV(C) of the Amended Final Judgment (CX 2, Ex. 10) prohibits ASCAP from discriminating between licensees which are similarly situated, and ASCAP took the position that other background music services licensed by ASCAP, such as Muzak and Seeburg, were situated similarly to 3M (Arrow Tr. 1287, 1292-93, 1296; see also Brettler Dep. 325).

These problems, of course, were peculiar to ASCAP's own operations. But one additional problem raised in the discussions between ASCAP and 3M was a problem that would confront anyone considering licensing 3M: the problem of relicensing 3M's customers after their initial three-year licenses expired (Arrow Tr. 1271).

Traditionally, providers of background music services had leased the tapes to their customers (Arrow Tr. 1269).

With a lease arrangement, the customer is required to return the tape at the expiration of the term of the lease. If public performance licenses are coterminous with the lease, there is little or no danger of infringing performances, and consequently no policing problem.

What 3M proposed was a departure from this method of doing business: 3M proposed to sell the tapes outright (Arrow Tr. 1269). 3M was willing to secure a public performance license for its customers for a three-year term. After the expiration of the term, however, the 3M customer would retain the tape and the licensor of the music would have the problem of attempting to relicense him.

Since most of the problems 3M was discussing with ASCAP were peculiar to ASCAP and its consent decree obligations, ASCAP suggested several times that the type of licenses 3M wanted should be sought directly from publishers. Allen Arrow, the New York attorney retained by 3M for its background music projects, testified that

> "I believe on more than one occasion during our meetings with ASCAP's representatives, it was suggested that the type of license which 3M was seeking could best be obtained from its members, from ASCAP's members, that is.
>
> "The Court: Direct?
> "The Witness: Direct." (Tr. 1357)

Eventually 3M adopted ASCAP's suggestion and sought public performance licenses directly from ASCAP publishers.* Arrow and one Lindgren, a 3M employee, talked to a number of publishers and, in the ensuing weeks, 3M concluded several agreements (Tr. 1963-75; see *e.g.*, 3MPXs 32, 50, 56).

The direct licenses which 3M negotiated with the individual publishers called for 3M to pay a performance rights royalty of three cents per composition per tape, for a three-year period, plus a mechanical** royalty of two cents per

* Since 3M was successful in reaching agreement with BMI, it did not have to seek licenses directly from BMI affiliates.

** See Glossary: "Mechanical Right".

composition per tape (Arrow Tr. 1328; *e.g.*, 3MPX52). Since each tape was to contain 700 compositions (Arrow Tr. 1263-64), the total performance royalties to be paid by 3M in respect of any tape amounted to $7.00 per year, or $21.00 for the three-year period.

Despite CBS' unsupported assertions to the contrary, it appears that 3M got a real bargain in its direct licenses. CBS insists on characterizing royalties received by publishers who licensed 3M as "windfalls" (Plaintiff's Findings pp. 73, 79, 83; Post-Trial Brief p. 8), "'found' money" (Plaintiff's Findings p. 79), and "'gravy'" (Brief p. 7 (twice))—this last word always in quotes although the only person known to have uttered it is CBS' counsel. For example, CBS states "3M certainly paid substantial premiums over fair market values." (Plaintiff's Findings p. 105) No support is offered by CBS for this assertion, and none is to be found in the record. Indeed the record reveals exactly the contrary.

The record reveals that 3M was offering ASCAP a rate lower than Muzak and Seeburg were paying (Arrow Tr. 1320-21). 3M's first offer to ASCAP was a total of $27 per tape for three years (3MPX2). ASCAP was asking between $21 and $30 per tape per year, or a total of $63 to $90 per tape for the three-year period (3MPX7). In its direct licenses, the total that 3M finally agreed to pay per tape was $21. Had 3M licensed through ASCAP at the higher rates contemplated, and used the same number of songs of each publisher as it licensed directly, these publishers probably would have received more. As it was 3M cut almost ¼ off the amount of its very first offer to ASCAP, by licensing directly.

Thus 3M obtained all the music it needed for the M-700 at bargain rates, within its time schedule (see Arrow Tr. 1318, 1327, 1432, 1975), and achieved quite a success, for the M-700 was to become one of the rare 3M operations to earn a net profit during its very first year (Arrow Tr. 1977). Shortly thereafter 3M commenced a successful program to acquire additional licenses covering other compositions for a second series of M-700 tapes (Arrow Tr. 1975-76).

The obvious risk to publishers in licensing performance rights to 3M customers for a three-year term at a rate of three cents per composition was that the licenses would turn out to be perpetual ones. The practical difficulties in relicensing 3M's customers at the end of the initial term were considerable. Many thousands of establishments purchased M-700 units (Arrow Tr. 1262). The performance fees paid with respect to each establishment for the entire group of compositions on the M-700 tape were small—$7.00 per year—and the performance fees attributable to the compositions of any single publisher were minuscule. Clearly, a publisher could not profitably relicense any establishment which offered even the slightest resistance.

The problem of policing the establishments after the expiration of the three-year license term is a theme common to the testimonies of virtually all of the witnesses who considered 3M's proposals in detail. ASCAP had raised that problem initially with 3M (Arrow Tr. 1269-70). When publishers considering licensing 3M directly approached ASCAP to inquire why ASCAP had been unable to reach agreement with 3M,* policing was one of the problems ASCAP cited. Leon Brettler of Shapiro Bernstein testified:

> "There was a big problem in the minds of ASCAP about what happens after the three years, how do you police it." (Brettler Dep. 325)

Salvatore Chiantia testified that Bernard Korman of ASCAP had expressed concern about the "problem in the eventual policing of the performing rights" because 3M was

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* There was nothing sinister about checking with ASCAP; ASCAP had suggested the possibility of direct licensing to 3M in the first place (Arrow Tr. 1357). As a matter of prudence, a publisher evaluating 3M's proposal and knowing that 3M and ASCAP had failed to reach agreement would want to learn what deficiencies or pitfalls ASCAP had seen in the 3M proposal. As Sal Chiantia stated,

> "I wanted to know what ASCAP knew about it and to help me to make up my mind what I was going to go into—whether I was going to go into that program." (Tr. 2991)

selling rather than leasing the machine (Dep. 122; see Dep. 119-120); Chiantia said that the people at ASCAP

> "were convinced the rate being offered by Minnesota Mining would not be enough to compensate them for the time and trouble that they would have to expend to effectively police." (Dep. 129)

When AGAC wrote to publishers claiming that the consent of writers under AGAC contracts was required in order to license 3M, AGAC too stated a concern with the policing problem:

> "The performing royalty paid by 3M covers a period of three years. This may well turn out to be a perpetual license, because we see nothing to prevent buyers of the tapes from using them after the three years. The expense and trouble of proper 'policing' by publishers of buyers to make sure they do not freely use these tapes after that time, can be so great that policing will not take place." (3MPX27)

Publishers who did deal with 3M were concerned about the policing risks, but hoped some way would be found to solve the problem which, of course, would not occur for three years down the road (*e.g.*, Chiantia Dep. 128). And for at least four of the publishers who were not willing to license 3M the policing problem was a principal concern (see discussion of specific publishers, pp. 49-58 below).

Policing, a problem prospectively, became a problem in fact. Sal Chiantia testified that:

> "my worst fears had been realized. At the end of the year, we were faced with a situation where people were using our compositions and not paying performance licenses." (Chiantia Dep. 174)

Even Allen Arrow conceded that only about a third of 3M's customers had renewed their licenses (Tr. 1994-95). Thus, the policing problem was a real drawback in the proposition offered to the publishers by 3M.*

* CBS has sought to dismiss the policing problem as illusory, saying that the publishers who licensed directly should have gotten ASCAP to do it. There are a whole host of reasons why this was

Despite this, 3M was successful in signing contracts with 27 of the 35 publishers it approached. CBS ignores 3M's success. CBS would have this Court find that the eight publishers with which 3M did not reach agreement were a "consortium" (Plaintiff's Findings p. 92) which "shared the determination to keep direct licensing out of the performance rights field * * *." (*Id.* p. 73)* Analysis of the circumstances surrounding the discussions between 3M and each of these eight publishers completely destroys any claim

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not an answer to the policing problem. In the first place, ASCAP was obviously reluctant to undertake the policing job even when 3M was seeking a license from ASCAP itself (Tr. 1270; Brettler Dep. 325; Chiantia Dep. 119-22, 129). As Allen Arrow conceded, 3M was aiming at a new market of smaller establishments, and its venture involved a departure in that the establishments would purchase the tapes outright (Tr. 1269-70). As it is, ASCAP loses money on the infringement suits it does bring (Marks Tr. 2617). Thus, ASCAP did not welcome the prospect of policing thousands of establishments which if licensed would pay a very low rate, and did not believe that it could profitably do so (Chiantia Dep. 129). (Indeed, the agreement which ASCAP eventually did reach with 3M was limited to the M-1200 machine which is leased rather than sold and therefore does not carry with it a policing problem.) Secondly, ASCAP justifiably took the position that having created the problem in the first place by granting three-year licenses, the publishers should take the responsibility of policing (Finkelstein Tr. 3785-88; see Chiantia Tr. 3004-08). Finally, ASCAP justifiably took the position that it would be improper for it to spend the money of the membership on a project benefiting only a few specific members (Finkelstein Tr. 3785-88).

* CBS appears to argue that since publishers uniformly were willing to grant mechanical licenses to 3M, the motives of those who declined to grant performance licenses as well are somehow suspect (see, *e.g.*, Plaintiff's Findings pp. 81-82). There are two compelling reasons why this inference cannot be drawn. In the first place, the licensing of mechanical rights to 3M was compulsory under the Copyright Law; publishers had no choice in the matter. 17 U.S.C. § 1(e).

Furthermore, even if it were assumed that the publishers exercised a choice in granting mechanical licenses while refusing performance licenses, the CBS argument wholly ignores the differences between the two kinds of licenses which make difference in treatment appropriate. The mechanical license is a license to 3M itself to make and sell the tape. It is a "one shot" license; no further payment is required from 3M or its customer once the initial mechanical license fee is paid. Hence, no policing of 3M's customers is necessary in connection with a mechanical license.

On the other hand, each playing of the tape is a performance requiring a performance license. Since 3M was only willing to pay

of concerted action or unlawful refusal to deal. As will be detailed below, one publisher had completely misapprehended the magnitude of the money involved; three other publishers later reached oral agreements with 3M, but 3M backed out because it had concluded an agreement with ASCAP; two other publishers reopened negotiations with 3M, but appear ultimately to have failed to overcome their initial concern about policing. At most two publishers took positions which could be said to be opposition to direct licensing per se, and Allen Arrow believes he told one of them that his attitude did not represent the overall view of the music publishing industry. The history of 3M's negotiations with those eight publishers follows.

Chappell & Co., Inc.: The first publisher 3M approached was Chappell & Co., Inc. (Tr. 1324-25). 3M representatives had a number of discussions with Ricketts, an executive of a sister company in England, who was temporarily participating in Chappell management because of the death of a Chappell executive, and with Wattenburg, counsel to Chappell (Arrow Tr. 1325-37). Although Ricketts and Wattenburg displayed interest in 3M's proposal, Chappell finally turned it down, Wattenburg saying to Arrow that Ricketts felt that performing rights should be licensed through ASCAP (Arrow Tr. 1330, 1333, 1338-39). Later, when 3M was putting together a second tape for the M-700, Ricketts sought to reopen negotiations with 3M (Arrow Tr. 1342). Further discussions were held, but Chappell ultimately adhered to its original decision to stay out of the M-700 program (Arrow Tr. 1343).

What did the late Mr. Ricketts (Arrow Tr. 1993) mean when he expressed the view that performing rights should be licensed through ASCAP? Allen Arrow makes it clear:

> "Mr. Ricketts • • • had indicated to me on more than one occasion that he thought that Chappell's performing rights should be licensed through ASCAP

for a three-year performance license, the publisher considering whether to grant this kind of license had to confront the prospect of either spending more than it might collect in order to relicense 3M customers, or permitting them to perform the tape indefinitely without further payment of performance royalties.

> in the United States, and that *he was concerned with the establishment of a perpetual performing right in the hands of 3M's purchasers in the event that ASCAP did not license and police those rights.*" (Tr. 1346; emphasis added.)

Wattenburg shared those fears; at deposition, Chiantia related a conversation which he had had with Wattenburg on the subject. Although Wattenburg considered the 3M proposal "interesting and attractive",

> "His concern, was that at the end of the initial period, the responsibility for the licensing and collection of performing fees would devolve upon us [the publishers] and he wondered whether we would be equipped to do it properly, which was the concern of everyone." (Chiantia Dep., Tr. 1244)

A review of the record makes it clear that Chappell & Co. did not find it easy to resolve the conflicting considerations presented by the 3M proposal; the income for the initial three year term was attractive, but the problem of collecting royalties after that term expired found no apparent solution. Thus, Chappell expressed interest, turned down the deal, expressed new interest, and turned the deal down again. In view of the relatively small number of 3M customers who have been relicensed, Chappell's decision appears to have been vindicated (Chiantia Dep. 174; Arrow Tr. 1994-95). In any event, from all indications it was a business decision, honestly made.

MPHC: MPHC, or Music Publishers Holding Company, is a publishing company owned by Warner Brothers, and was the second company approached by 3M (Arrow Tr. 1412, 1414). Arrow testified at trial that on October 28, 1964 he and Lindgren of 3M met at the MPHC offices with George Lee of MPHC and possibly Krasilovsky, an attorney for MPHC, to present the 3M proposal. After listening to the proposal, Lee said that he would recommend it, but that the final decision would have to be made by Herman Starr who unfortunately was ill at the time. Lee asked that 3M be patient while he waited to have an opportunity

to discuss the proposal with Starr (Arrow Tr. 1412-15, 1988). At this point, Arrow felt that the atmosphere was favorable and had the impression that Starr would not reject the proposition (Arrow Tr. 2004). As it happened, Starr never recovered from his illness. By the time Starr had died and a replacement was appointed, 3M had found substitute compositions and had gone ahead without the MPHC catalog (Arrow Tr. 1415).

In late 1967, further negotiations took place between 3M and MPHC concerning performance licenses to compositions for a subsequent tape. An oral agreement was reached, but the oral agreement did not ripen into an actual license because 3M decided not to go through with it (Arrow Tr. 1988-89, 1998).

Famous Music Corporation: On October 29, 1964, Arrow and other representatives of 3M met with representatives of Famous Music Corporation to present the 3M proposal (Arrow Tr. 1377-79). Sidney Herman, one of the Famous representatives present, said there were certain things the Famous people had to discuss among themelves after the meeting:

> "We weren't sure if we gave them a license, there were certain things, we didn't know a small company like ours could handle, like the policing of the performance rights. We didn't have facilities, we didn't have the manpower. That was an important thing, an important consideration." (Dep. 23)

A few weeks later a second meeting was held between representatives of ASCAP and 3M. At the conclusion of the meeting, Arthur Israel, then the President of Famous, suggested that 3M make another try at licensing through ASCAP. Israel's reasons for suggesting that 3M try again with ASCAP are not explicit because Israel, who died in 1965 or 1966, did not discuss them with Herman or with the representatives of 3M (Arrow Tr. 1387-88, 1993; Herman Dep. 16). However, it seems as likely as not that the policing problem mentioned by Herman as an important consideration was the motivating force. Since 3M was at a

point at which decisions had to be made and was unwilling to enter into additional protracted negotiations, the discussions with Famous "just ended" (Arrow Tr. 1389).

In 1967, Herman, having learned that other publishers had received considerable royalties from 3M tape sales, interested his new superiors at Famous in approaching 3M to see if Famous could join the program (Herman Dep. 64-66). Negotiations were held with respect to licenses for performance rights to songs in the Famous catalag. A tentative agreement acceptable to Famous was reached and a contract was drafted, but 3M backed out because it expected to reach agreement with ASCAP (Herman Dep. 67-74; Arrow Tr. 1982-87).

Edwin H. Morris Company: Arrow approached the Edwin H. Morris Company on behalf of 3M by telephoning a Mr. Gerson, an employee of the company (Arrow Tr. 1393-94). Gerson said he would have to discuss the matter with Edwin Morris (Arrow Tr. 1394). A short time later, Gerson telephoned Arrow and told him that the company would not entertain the proposal (Arrow Tr. 1395).

Morris testified at deposition that after discussing the matter with Gerson he had decided not to pursue it because the amount of money involved was very small and didn't interest him (Dep. 129-31). Morris stated that he thought that 3M was "trying to get something for virtually nothing" (Dep. 131). Although Morris could not recall the amount, he said that he would have remembered it if it had been important (Dep. 129-31). Morris said that the offer "certainly didn't involve any money" and expressed the opinion that the publishers who licensed 3M must have done so solely to get exposure of their material (Dep. 134).

If not carefully presented, the 3M proposal was certainly capable of sounding like small change. The performance royalty rate for each composition was only one cent a year for three years. Without mention by 3M of amounts of guarantees or the number of tapes it expected to sell, a publisher could easily conclude that a penny a year from a few doctors' and dentists' offices was not worth bothering

about. And Arrow testified that he probably did not discuss with Gerson a guaranteed minimum number of compositions (Tr. 1395).

Rarely do the feelings of a witness appear as clearly from the cold transcript as they do from Morris' testimony when, at his deposition, he learned for the first time the size of the guarantees that 3M had given to other publishers. When asked if he knew that Shapiro, Bernstein got a $30,000 guarantee from 3M, Morris replied,

> "No, I didn't know it at all. I have nc idea." (Dep. 137)

Moments later he observed, "nothing like that ever came to us." (Dep. 138) Later, Morris volunteered,

> "Now may I say something?
> "Q Yes.
> "A You say Shapiro-Bernstein was offered $30,000 or got $30,000. I never heard this. 3M never approached me or anyone I know of with these kind of figures. I don't know. When you are talking small money against $30,000, don't you think something is different? I didn't shut any doors." (Dep. 140; see also Dep. 141)

On the next day of his deposition, Morris several times repeated his surprise at learning the amounts offered to other publishers; for example,

> —"You have told me they made deals, far transcending anything that I ever heard of before until I entered this room." (Dep. 178)
> —"As I told you yesterday, this is the first time I have ever heard figures." (Dep. 192)
> —"I never heard any figures and I must repeat, until yesterday • • •." (Dep. 194)
> —"My curiosity was not aroused at all until yesterday." (Dep. 194)
> (See also Dep. 141, 150, 151.)

Morris expressed dismay that in attempting to negotiate for a catalog as valuable as his, Arrow had failed to convey any kind of dollar offer in the magnitude of that offered

Shapiro, Bernstein (Dep. 190-91). In Morris' opinion, Arrow was "a very poor business man." (Dep. 192-93).

It is quite clear that there was a failure of communication between 3M and the Edwin H. Morris Company. Morris was under a complete misapprehension as to the financial potential of the 3M deal.

Irving Berlin Music: No representative of Irving Berlin Music testified at deposition or at trial. Although Irving Berlin Music is not named as a defendant in this action, CBS was permitted to bring out through the testimony of Arrow statements allegedly made to Arrow by an outside attorney for Irving Berlin Music.

According to Arrow, Irving Berlin Music, through its attorney, one Theodore Jackson, initially declined to license 3M directly for performance rights for the M-700 (Arrow Tr. 1408-09). There is some confusion in Arrow's testimony on the reasons expressed by Jackson for the decision. On direct examination, Arrow testified that he was told that the company was not interested in licensing performing rights except through ASCAP (Tr. 1410-11). On cross-examination, Arrow stated that the reason he was given was that the number of Irving Berlin Music's compositions that 3M proposed to use was not acceptable (Tr. 1980).*

What is clear, however, is that at a later time Jackson told Arrow that Irving Berlin Music would be willing to enter into a deal with 3M (Arrow Tr. 1987). The reason that no agreement was ultimately concluded was that 3M backed out in anticipation of making a deal with ASCAP (Arrow Tr. 1987-88; see Tr. 1986-87).

The Richmond Organization: Allen Arrow did not approach The Richmond Organization ("TRO") until May

* Each of these reasons is consistent with concern about capacity to police. As to the first reason, if ASCAP grants the licenses, the policing job will fall to ASCAP and the publisher will not have to worry about it. And as to the second reason, the economic feasibility of policing by an individual publisher is affected greatly by the number of his compositions on the tape. A publisher with a $1.50 annual license fee interest in a tape (150 compositions) might be able to make a token relicensing effort through a mailing or the like while a publisher with a ten cent annual license fee interest (10 compositions) economically could make no relicensing effort whatever.

1965. By that time, 3M had made deals with several other publishers (Arrow Tr. 1421; see, *e.g.*, AX 209, AX 211, AX 222, 3MPX24, 3MPX32, 3MPX50, 3MPX56). Apparently, 3M was not willing to guarantee use of as large a number of Richmond songs as it had been willing to guarantee to other large publishers earlier.* In any event, negotiations broke down when the parties could not agree on the number of Richmond Organization songs to be used (Tr. 1421, 1423).

The reactions of the responsible personnel at Richmond to the 3M deal were examined both at deposition and at trial. In his testimony at trial, Alan Shulman, who had been business affairs director and house counsel at Richmond in mid-1965, testified that he recommended rejection of the 3M proposal for two reasons: first, the royalty rate was too low and second, policing after expiration of the three year performance license term appeared to be a real problem (Shulman Tr. 3093-94). Shulman expressed his concern about policing in this way:

> "• • • it seemed to me if each licensee was going to be paying under an existing license something like three cents for a performing right, and even assuming we were dealing with all 50 titles • • • we were still talking about $1.50 per licensee. It seemed to me it would be terribly uneconomical for us to chase a licensee who possessed a tape when we were only going to net under an original license $1.50. How could we effectively and economically be sure we could collect after the term of the agreement, three years had expired?" (Tr. 3120)

The prospect that relicensing would be "costly beyond the benefits that the license would produce in terms of income" (Shulman Tr. 3094), meant that the original three year license would be likely, as a practical matter, to be a perpetual license.

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* Apparently, 3M proposed to select some portion of a list of 51 Richmond Organization songs (Tr. 3104-05; 3MPX 159). 3M had guaranteed use of 100 songs each to Leeds and Shapiro, Bernstein (see 3MPX 50, AX209).

Al Brackman, general manager of The Richmond Organization, testified at deposition as to his concern about policing:

> "They had no way of guaranteeing stopping the continuing useage [sic] after three years. They would not guarantee the recall of the tapes which they were sold outright, so it was a very bad deal, I thought, to take a fee that purported to be for three years and yet would have continuing use much beyond that if someone wanted it." (Dep. 17)

Brackman also did not like the proposition because it would require him to collect and distribute the writers' shares of royalties. (Dep. 22)

On July 15, 1965, Shulman wrote Arrow, conveying the Richmond Organization's decision not to participate. Shulman wrote that "we have decided that as a matter of policy we would like to pass this one up." (3MPX47) Asked to elaborate on this at trial, Shulman testified that

> "• • • what I used here were words that politely said, (a) it is a rotten deal, as a matter of fact, you have changed it several times and we just don't like it. As a matter of fact, I personally was kind of annoyed about the way this deal had progressed because the ground kept shifting. Originally there were a whole number of tunes—let me say this. Allen Arrow is a friend of mine. He continues to be. I think I was—
>
> "The Court: It was a euphemism?
> "The Witness: Right." (Tr. 3096)

Several months later, in November, Howard Richmond of the Richmond Organization wrote an inter-office memorandum transmitting a letter from AGAC* to publishers concerning the 3M deal. In his memorandum, Richmond suggested that a letter be written to Arrow's partner to put him on notice "so that nothing goes ahead until there's an industry decision." (3MPX168). Neither Shulman nor Brackman was able to explain what Mr. Richmond meant by this (Tr. 3128-29; Brackman Dep. 4647).

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* Discussed in detail at pp. 62-64 below.

Whatever Mr. Richmond's concern may have been, however, it did not last long. The following month, Mr. Richmond wrote Harold Orenstein, Arrow's law partner, to attempt to interest 3M in including The Richmond Organization in the program. The tone of the letter is so at variance with the inferences CBS seeks to draw that it bears quotation in full:

"Dear Harold:

Re: *MMM MUSIC*

Now that I know how much we're losing by not being represented in the MMM Program, just want you to know that we have 100 to 150 great songs in our catalog and we hope they will be included in your next programming set-up.

At any rate, try to include us if you feel we justify the attention.

All best.

Sincerely,

Howie
Howard S. Richmond" (3MPX48)

Subsequently, in February 1966, The Richmond Organization had further discussions with 3M (Tr. 3137). By then 3M was interested in only 12 to 15 Richmond songs, and these negotiations fell apart on the question of how many compositions 3M would use (Arrow Tr. 1990; Shulman Tr. 3137).

Robbins, Feist & Miller: In late 1964 or early 1965, Arrow telephoned Arnold Maxin, who was at that time employed by Robbins, Feist & Miller, a publisher which was also known as the Big Three, to request performance licenses for the M-700 program (Arrow Tr. 1400-01). Arrow recalls that there was a subsequent telephone conversation in which Maxin said that he was not prepared to recommend an agreement with 3M and that it would be "disloyal" (Arrow Tr. 1401-02).

Although Arrow's recollections of his conversations with Maxin more than eight years ago may be accurate, it would

be wrong to read too much into them. As with so many other witnesses, a preference for licensing through ASCAP may well have been based solely on legitimate practical business considerations.

Bregman, Vocco & Conn: Bregman, Vocco & Conn is not a defendant in this action and there is nothing in the record with respect to the negotiations beween 3M and Bregman, Vocco & Conn concerning the M-700. However, it is clear from the record that Jack Bregman did not like the idea of 3M securing licenses directly from ASCAP members. Chiantia testified at deposition to a conversation with Bregman in which Bregman "got very emotional" on the subject; Bregman argued that if 3M were licensed individually everything would have to be licensed individually. In Chiantia's view, Bregman gave no "good reason" for not directly licensing 3M (Chiantia Dep., Tr. 1245-46).

Arrow testified to a conversation with Bregman in which Bregman said that it was wrong for 3M to approach publishers for direct licenses and that performing rights should be licensed through performing rights organizations such as ASCAP which had the competence in that area (Arrow Tr. 1408). Arrow believes he told Bregman (and in any event Arrow had the impression) that Bregman's attitude toward direct licensing did not represent the overall view of the music publishing industry (Arrow Tr. 1991).

In addition to the eight publishers with which 3M never signed a contract, there was a publisher which did not accept 3M's proposal for the first set of tapes but reopened negotiations with 3M and granted a license for the second set of tapes. Although this publisher, Frank Music, is not a party to this action, CBS was permitted to bring out through documents and through the testimony of Allen Arrow hearsay statements of representatives of Frank Music.*

Arrow approached Frank Music, which was a client of his law office, with the 3M proposal in October 1964 (Arrow

* These statements were admitted for limited purposes.

Tr. 1423). After a number of discussions, Milton Kramer wrote a memorandum to Arrow stating that because Frank Music seemed to be of "relatively minor interest to 3M," Frank preferred not to go along on the first tape, and suggesting that perhaps they could discuss it again when 3M began preparations for the second set of tapes (Arrow Tr. 1430; 3MPX43).*

On the basis of his discussions with Kramer, Arrow concluded that Frank Music would have dealt on the first series of tapes if it would have gotten more money, but that the money offered to it was not sufficient to induce it to make a departure (Arrow Tr. 1437, 1523). When asked if there was any indication to him of why Frank Music was not ready to accept the 3M offer, Arrow replied:

> "*Well, we discussed the perpetual license situation, the possibility that the music would be performed beyond the three years.* We discussed the limited number of compositions which 3M was ready to use, which was a financial factor and it was Mr. Kramer's position that this was something new and the company just wasn't ready to go into it." (Tr. 1525; emphasis added.)

Having initially adopted a wait and see attitude, Frank Music sought to reopen negotiations with 3M after it became apparent that other publishers were making a lot of money (Arrow Tr. 1992). And an agreement between Frank Music and 3M was reached for the second series of M-700 tapes (Arrow Tr. 1439).

Finally, seizing upon two or three colorful phrases from Leon Brettler's deposition, CBS claims that the first two publishers to make agreements with 3M—Shapiro, Bernstein (Leon Brettler) and Leeds (Sal Chiantia)—were

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* The memorandum also contained a reference to "our repeatedly expressed position as stalwarts of ASCAP" which Arrow regarded as being "stated with a smile" because Frank Music was conspicuously not a stalwart of ASCAP (Tr. 1530). Frank Loesser, the prominent composer and sole stockholder of Frank Music, had consistently declined to serve, or to have anyone from his company serve, as a member of the ASCAP board. Loesser had always been of the view that his company should stay out of what he regarded as extra curricular activities at ASCAP (Tr. 1531). Hence, Frank Music was hardly an ASCAP stalwart.

subjected to some kind of ostracism by their fellow publishers. This contention is completely inconsistent with subsequent events. After dealing with 3M, both Chiantia and Brettler were elected by their peers to positions of honor and respect as members of the ASCAP Board of Directors (Chiantia Dep. 18-19; Brettler Dep. 3).*

The publishers confronted with the 3M proposal reacted to the proposal with the diversity of behavior common to business and to life. There are no elements of parallel behavior which would suggest concerted action. Some of the publishers approached by 3M checked with ASCAP prior to responding to 3M's proposal. Some of these publishers licensed 3M; some did not. Some who did not, later changed their minds. And as to those who did not it must be remembered that these publishers were not called upon to express positions on direct licensing generally; they were offered a specific proposal by 3M and undertook to respond to it. A negative response to the terms 3M offered does not imply that these publishers would have refused offers on different terms. No generalizations about unwillingness to license 3M or anyone else directly can properly be drawn.

When all is said and done, the plain fact is that 3M was overwhelmingly successful in selling publishers on a direct licensing proposition which had a serious risk from a business point of view: the relicensing problem—a problem which has been proven to be very real (Chiantia Dep. 174; Arrow Tr. 1994-95). The so called "3M incident" aids CBS not at all. To the exent it has relevance, 3M's experience demonstrates that publishers will readily negotiate for direct licenses.**

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* In addition Chiantia is a Vice President of ASCAP and President of the National Music Publishers Association (NMPA); Brettler is Secretary of the NMPA (Chiantia Dep. 3; Brettler Dep. 4).

** CBS' claim that "adverse inferences" should be drawn against the defendants in this case for failure to present any evidence on the 3M operations (Post-Trial Brief pp. 53, 55) is ludicrous. The adverse inference rule only applies to a party where the adversary has presented proof *against* it. The 3M evidence presented by CBS supports defendants' contentions that publishers are willing to grant direct licenses. Defendants are not required to try to contradict plaintiff's evidence when plaintiff's evidence helps them.

3M: The Role of AGAC: Like the 3M experience itself, the role of AGAC in relation to the 3M program has been given disproportionate emphasis in this record. And like the 3M experience generally, the AGAC chapter undermines rather than confirms CBS' hypotheses.

What is AGAC?

AGAC is not a party to this action, nor has it any official connection with any defendant in this action. AGAC is a trade association of some 2,400* composers and authors of music which has its office in New York (3MPX27; PX461). Founded in 1931, AGAC is operated by unsalaried officers and a council drawn from the membership (Lane Tr. 992, 1167, PX460, PX461).

For the most part, AGAC has concerned itself with the problems of its members in relation to their publishers (Lane Tr. 992, 1011, 3464). Originally AGAC's principal activity was the negotiation with a trade association of music publishers of a standard contract form for use by AGAC members in contracting with publishers (Lane Tr. 992). The terms of the contract form currently in use were negotiated in 1948** (Brettler Dep. 177, Chiantia Dep. 15). Some years thereafter, AGAC began a program of auditing publishers to determine whether the publishers had properly computed royalties payable to authors and composers (Lane Tr. 1137, 1167-69).

From time to time, AGAC has made complaints to publishers that the interests of its members were not being protected or that the terms of its contracts were being violated (Lane Tr. 1011, 1168-69; AX184). And from time to time ASCAP or BMI has been the target of AGAC complaints (Lane Tr. 1116-19, 1123-24, 1170). However, AGAC has never brought suit against anyone; it has confined itself to

*This figure is less than 8% of the number of writers who are members of ASCAP or affiliates of BMI (Marks Tr. 2407-08; PX441).

**The current form, 3MPX31, bears copyright dates of both 1948 and 1969, which has led to some confusion as to whether the contract was revised in 1969 (*e.g.*, Lane Tr. 1067). However, the references cited in the text make it clear that there was no substantive revision.

techniques of persuasion and conciliation (Lane Tr. 1092, 1094).

In the opinion of publisher Alan Shulman, the influence of AGAC has declined in recent years and AGAC today is not an important force in the industry (Tr. 3076). As publisher Sal Chiantia put it, "Times change"; there was a time when many of his important writers were AGAC members, but that is "not true today." (Chiantia Dep. 14-15) Chiantia testified that the use of the AGAC contract at his firm is declining (Tr. 2882-83). Shulman recently signed the first AGAC contract used at his firm in three years (Tr. 3073).

Shulman stated that most young writers are not members of AGAC, a fact which he attributed to the greater sophistication of young writers, to their relationships with professional advisors which make the assistance of an outside organization unnecessary, and to the elimination of the practices by publishers which led to AGAC's creation (Tr. 3074, 3076). The only witnesses who testified that they are now members of AGAC—Burton Lane, John Green, and Ned Washington—are veteran writers who joined AGAC more than forty years ago (Lane Tr. 990; Green Tr. 3464; Washington Dep. 92).

AGAC and 3M:

In expressing its views on the 3M program, AGAC limited itself to its traditional techniques of persuasion and conciliation. And even these mild techniques were not employed in a particularly crisp way. AGAC's efforts in connection with the 3M program were neither prompt, nor vigorous, nor enduring. The sum of AGAC's activity was the writing of one form letter to publishers rather late in the day, and the arranging of a meeting between ASCAP and 3M. Although The AGAC letter had no apparent effect on the attitudes or actions of publishers, and although no agreement between ASCAP and 3M was reached for another year and a half, AGAC took no further action.

3M started negotiating with publishers in October of 1964 (Arrow Tr. 1324-25, 1975). By June of 1965, 3M had filled

its music needs for the first set of M-700 tapes and was finishing the recording of the songs (Arrow Tr. 1975). When AGAC finally got around to writing its letter in November of 1965, 3M was well on its way to fulfilling its music requirements for the second series of M-700 tapes (Arrow Tr. 1975; see, *e.g.*, AX193, AX194, AX197, AX203, AX205, AX208, AX213, AX216, AX219, AX223).

The AGAC letter (3MPX27) was a form letter to publishers who had agreements with AGAC to use the AGAC contract in dealing with writers who were AGAC members (Lane Tr. 1057-58). The letter reviews the provisions of the AGAC form requiring the consent of the writer to "bulk" or "block" licenses and to licenses of new (post-1937) uses, and concludes that the 3M contracts fall within these provisions. The letter goes on to argue that even apart from the contract requirements, as a matter of policy writers ought to be consulted by publishers as to the terms of licenses such as those proposed by 3M. Finally, the letter discusses the merits of the 3M proposal and expresses concern about policing.

AGAC's letter is unexceptionable. The letter does not urge that the publishers refuse to grant direct licenses to 3M; it merely claims that the consent of AGAC writers is required before such licenses may be issued, and urges the publishers to evaluate carefully the proposal made by 3M.

Certainly if the purpose of the letter were to cause publishers to refuse to deal with 3M it was almost embarrassingly ineffective. Apparently only one publisher so much as favored AGAC's then president Burton Lane with a reply (Lane Tr. 1077). Chiantia, for one, testified that he got the AGAC letter, did nothing about it, and never heard anything more from AGAC (Dep. 156-57).

The chronology of the negotiations with the publishers which elected not to accept 3M's proposal demonstrates clearly that the AGAC letter had no effect on their decisions. In all, there were eight publishers approached by 3M who did not grant performance licenses to 3M. The fact is that four of these publishers, Famous, Chappell, The

Richmond Organization and Irving Berlin Music, declined 3M's proposal prior to the date of the AGAC letter, and after the AGAC letter, sought to reopen negotiations with 3M (Arrow Tr. 1339-42, 1377, 1387-89; Herman Dep. 64-74; Tr. 1982-87; 3MPX47; 3MPX48; Arrow Tr. 1410-11, 1987). Another publisher, MPHC, was never able to respond to 3M's initial proposal because of Herman Starr's illness, but sought to revive negotiations after the date of the AGAC letter (Arrow Tr. 1412-15, 1988, 1998). Two other publishers, Morris and Robbins, Feist & Miller, rejected 3M's proposal several months prior to the AGAC letter (Arrow Tr. 1393-95, 1400-02). As to the eighth publisher, Bregman, Vocco & Conn, the record is silent as to the timing of the 3M negotiations.

AGAC As Marriage Broker: Actually, the AGAC letter almost fortuitously did turn out to have a beneficial effect; it created an opportunity for AGAC to act as a promoter of an agreement between 3M and AGAC. Allen Arrow testified that by chance he met Miss Stern, executive director of AGAC, on the street some time about March 1966 (Arrow Tr. 1463; see Lane Tr. 1038). During their conversation it was suggested that a meeting at AGAC would be appropriate in order to discuss "the actual facts of the matter and whether AGAC should have written this kind of letter at all." (Arrow Tr. 1463-64) Miss Stern arranged such a meeting at AGAC for April 21, 1966.

Representatives of 3M, ASCAP and AGAC—including, among others, Arrow, Herman Finkelstein and Burton Lane—attended the meeting (3MPX75). The meeting resulted in an agreement by Finkelstein and Arrow to meet again following Arrow's return from a trip (Arrow Tr. 1475).

Following this meeting, AGAC's role with regard to 3M was effectively over. Aside from a visit to Stanley Adams, ASCAP's President, to express concern over Finkelstein's attitude at the April 21 meeting and from occasional inquiries to Finkelstein as to how negotiations were progressing (Tr. 1101-02, 1104, 1109), Lane took no further action with regard to 3M.

In the ensuing months 3M and ASCAP met a number of times (Arrow Tr. 1475-76), and on July 1, 1968 executed an agreement entered into more than a year and one half after AGAC's letter, and more than a year after the meeting between 3M and ASCAP arranged by AGAC (3MPX94, 3MPX95). By the time the agreement was reached, 3M had become interested in marketing a larger player and cartridge set called the M-1200 which was to be leased rather than sold (3MPX86; Arrow Tr. 1479-81). The parties agreed that the arrangement between them would be limited to the M-1200 cartridges; 3M would continue to deal directly with publishers for performing rights for compositions on the M-700 cartridges (Arrow Tr. 1479-81). To this day, 3M has continued to deal directly with the publishers for performing rights to compositions on the M-700 cartridges (Arrow Tr. 1976-78, 1994). So far as appears, AGAC has done nothing with regard to 3M since arranging the April 1966 meeting.

The West Coast Committee: A loose-knit group of AGAC members who lived on the West Coast and met informally for lunch from time to time were referred to in AGAC as the West Coast Committee (Lane Tr. 1003-04). According to Burton Lane, the West Coast Committee had a history of becoming hysterical over issues, due perhaps to their remoteness from the center of action (Lane Tr. 1012, 1105).

At intervals of six months to a year, the West Coast Committee would fire a salvo to AGAC headquarters in New York containing intemperate criticism of AGAC's handling of various matters, including 3M. The record reflects three such criticisms relating to 3M. The first, PX 123, was sent approximately contemporaneously with the AGAC letter to publishers. The second, PX 137, was sent about six months later, in May 1966. The third and final, PX 133, was sent one year after that, in May 1967. Although ASCAP was not to reach agreement with 3M for more than six months after the last of these missives, and although 3M has continued to the present day to deal directly with publishers for performing rights for the

M-700, the West Coast Committee apparently has made no further complaint with regard to 3M.

The West Coast Committee communications are all strident in tone; Lane regarded at least one as advocating a conspiracy to refuse to deal (Lane Tr. 1030-31). But the critical fact is not what someone may have said; rather, it is what was done. In fact, the AGAC Council acted responsibly and properly in response to the West Coast proposals. The proposals were brought to the attention of the Council, the advice of legal counsel was obtained, and the proposals were rejected (Lane Tr. 1029-40).

To the extent that any relevant inference could be drawn from AGAC's role with regard to the 3M program, it is that AGAC would oppose any suggestion of a boycott of CBS.

(b) Writers and Publishers Would Deal Directly With CBS.

Understandably, considering 3M's success in acquiring performance rights directly from publishers, CBS does not rely solely on the 3M experience to support its claim of disinclination. It seeks to bolster this claim by a series of selective quotations from the depositions of four publishers —Leon Brettler, Edwin H. Morris, Jerry Vogel and Eugene Goodman.

By now we are all familiar with some of the words and phrases used in those depositions. But when the deposition testimony is examined for context, the words and phrases lose the character CBS has sought to impose on them. In reality, the depositions support not CBS' speculations that publishers would refuse to deal with CTN for performance rights, but rather the conclusion that publishers would in fact deal with CTN.

This conclusion is reinforced by the evidence given at trial by live witnesses, and by recognition of the realities of the music business as it actually exists.

1. *CBS' Use of Depositions: A Litany of Snippets*

Regrettably, BMI must caution the Court at the outset that CBS' excerpts from testimony cannot be relied upon as

fairly reflecting the substance of the testimony. For example, on page 48 of its Proposed Findings, CBS quotes Leon Brettler of the Shapiro Bernstein Company as saying that if ASCAP were enjoined from licensing television networks,

> "'I think the jolt to the industry, to my company, would be substantial.'"

In the first place, Brettler was not being questioned about ASCAP being enjoined; the question was what business changes would occur if ASCAP went out of the business of licensing television networks. Passing that, however, the effect of the quoted portion is undercut, if not eliminated, by putting the quoted half-sentence back into the complete paragraph of Brettler's answer:

> "[Objecting to the question as too unreal] . . .
>
> "*You throw this question at me which I have never thought about and expect to get an answer off the top of my head, which I think is unfair to expect me to do that.* So I will answer it by saying that I think the jolt to the industry, to my company, would be substantial. I think we would have a whirl of problems. I don't know what the ultimate effect would be. I don't know what the resolution of it would be. I don't know what alternatives would be available to us and I don't know how we would respond to the various options and alternatives that would be available. *And with all these uncertainties in the picture leading up to my answer, I really must say intellectualy* [*sic*], *I just don't know.*" (Dep. 294-95; emphasis added.)

Again, on page 50 of its proposed findings, CBS suggests that Brettler testified that if ASCAP were enjoined from licensing the networks, he would "'dread'" thinking of the possibility of developing a staff and training people

> "• • • in a very sophisticated body of law involving complex decisions, in a very sophisticated evolution of negotiation, in a very sophisticated concept of the

> economic—the true economic value of music to • • • the CBS Network • • •.'"

CBS has again attributed Brettler's answer to a question other than the one he was asked, and has deleted the portions of the answer that make that clear.

This time the question to which Brettler was responding was what are the benefits of ASCAP membership, and his answer was that he would dread having to develop a staff and train people

> "• • • in a very sophisticated body of law involving complex decisions, in a very sophisticated evolution of negotiation, in a very sophisticated concept of the economic—the true economic value of music to *a skating rink, to a tavern in Des Moines, Iowa,* to the CBS Network *and ABC and so forth and so on.*" (Dep. 270-71; italicized portions deleted from CBS' quote.)

Thus from the full text it is clear that Brettler was contemplating a situation in which there would be no ASCAP at all, and that he was not discussing the possibility of doing without ASCAP solely with respect to CBS Television Network.

With the caution that the testimony of deposition witnesses must be considered in context, we proceed to a discussion of the testimonies of the four publishers quoted by CBS.

Leon Brettler: Leon Brettler is the star performer in CBS' disinclination case. CBS quotes Brettler as having used the word "self-annihilation" in connection with the prospect of direct licensing the television networks (Post-Trial Brief p. 6). It describes Brettler as preferring to grant performance licenses through ASCAP rather than directly (*e.g.,* Plaintiff's Findings p. 85). It quotes his description of the reaction of ASCAP Board members to the news of Shapiro, Bernstein's direct licensing of 3M as "cannonballs", which he later amended, since "cannonballs" was an "exaggeration", to "spears and harpoons" (see *Id.* p. 86; Brettler Dep. 349).

Yet for all the words and phrases that CBS can pick out of the Brettler deposition it cannot point to one single place where Brettler testified that his company would not deal with CTN directly for performance licenses. In reality Brettler testified to the contrary. On the assumption that a television station or network were unlicensed by BMI or ASCAP and a television producer called Brettler to request performance rights, Brettler was asked whether he thought he could negotiate a deal with the producer. His answer was that he would negotiate some provision for performance licenses. "There is no question of the fact that we would negotiate something." (Dep. 184-85)

Not only did Brettler testify that *he* would deal, it was his view that "hordes" of other publishers would descend on producers and broadcasters in a mad rush to directly license their music, and that in their "mad rush" to get their music on the networks there would be a great deal of cutthroat price competition:

> "• • • I am virtually positive that there would be a deluge of price cutting bordering on the cutthroat nature that would lead to mutual self-annihilation.
>
> • • •
>
> "I mean among us competitors who would be so desperate and jockeying for position, none of us having any strength, dealing with one huge user or an industry that is a huge user, consisting of three main entities and we only have those three doors open to us and all 4000 of us converging through that door, I think there would be tremendous amounts of concessions and price cuttings and deals." (Dep. 295-96)
>
> "So the hoardes [*sic*] of descending publishers or the hoardes [*sic*] of desperate publishers would logically then descend on the producers • • •. There might be, for the sake of argument, 100 producers to go to but that is still a pretty small door considering the flood of music.
>
> "It would be very nice if • • • there were ten or twenty television networks or 100 or 1000 small television networks and if we couldn't make a deal with

> CBS * * * you would be successful somewhere else * * *.
>
> "If one record company turns down a record we have * * * a tremendous number of avenues to turn to. If we are rejected by CBS, NBC or ABC for any reason, including blacklisting because we are uncooperative on rates—this has been known to happen in other industries." (Dep. 304-05)

CBS also attacks Brettler for his stated preference, in connection with 3M's project, that performance licensing be done through ASCAP (Plaintiff's Findings p. 85). Whatever Brettler's preferences may have been, however, it is undeniable that his company did license 3M. The reasons are clear from Brettler's deposition: he was interested in the profits and he did not want to be left out of the 3M program while his competitors got in:

> "'I am inclined to go along with them because I have a feeling if we don't you and I are going to be standing out there in the snow looking at the warm bodies luxuriating in this thing. * * *'" (Dep. 331)
>
> "'* * * if ASCAP doesn't make the deal and these other publishers do make the deal, my company is locked out of it, and I just can't afford—wearing my first-and-foremost hat, that of being an officer of my company—I can't afford to take the chance of dilly-dallying here and find that my company is not participating in this project.'" (Dep. 335-36)

Thus, for all of the colorful snippets picked out of the Brettler deposition by CBS, the deposition demonstrates (1) that Brettler would deal with CTN directly, (2) that Brettler has dealt directly in the past despite any preferences he may have had to the contrary, and (3) that Brettler predicts that publishers in general would descend on the networks in a mad rush to grant direct licenses.

How, then, does Leon Brettler earn top billing on disinclination? Perhaps, as the passages just quoted make clear, it is because of Brettler's florid, metaphorical style: Leon Brettler never says anything half-way.

Edwin H. Morris: Edwin H. Morris, who operates the Edwin H. Morris Company, is given second billing by CBS in the disinclination revue. Like Brettler, Morris nowhere testified that he would not deal with CBS. Morris' testimony was that he would want CBS' direct licensing business and would entertain any proposal CBS made:

> "Q Would you want CBS's business, direct licensing business?
> "A Of course I am in business. I would like everyone in business to do business with me." (Dep. 206)
>
> "Let us assume that telephone does ring, that you are approached by producers and/or network people who are interested in obtaining direct licenses to the compositions or various of the compositions in the Morris catalog.
> Do you talk to those people?
> "A Yes.
> "Q Do you invite them to come into your office?
> "A I will even go to theirs." (Dep. 211-212*)

How, then, could Morris be cited in support of a disinclination case? CBS recites the now familiar litany of snippets from the Morris deposition—"disastrous", "the end of the road for me as a publisher", "I don't believe that would be the direction I would be inclined to go" (Post Trial Brief p. 6), and a somewhat larger quote to the effect that Morris felt that he would have less bargaining power without ASCAP (Plaintiff's Findings p. 51). To understand these excerpts it is necessary to know the context in which they were given and the considerations that Morris expressed.

Early in his carrer, Morris was employed by Warner Brothers. In 1935, Warner Brothers, believing that its catalog was quite valuable and that its income from ASCAP was not sufficient, withdrew from ASCAP and attempted to license broadcasters directly (Dep. 23, 33). The results were disastrous. Few, if any, broadcasters took licenses

* Not previously designated.

from Warner Brothers (Dep. 32). In consequence, Warner Brothers' music was not performed on the air and no income was received (see Dep. 26-27). Understandably, Warner Brothers' writers were extremely displeased with the loss of exposure and loss of income; many of these writers left Warner Brothers for other publishers (Dep. 24-25, 26).

Thus, at his deposition, Morris stated that he believes

> "• • • that any negotiations woule [*sic*] be better handled with an organization rather than me as an independent.
> "Q Why?
> "A His story [*sic*—History] had proven to me they didn't need me. I can only go by my experience what had happened back in '35, '36. A small operation like mine was of no importance to anyone." (Dep. 38)

and

> "I believe in ASCAP because of my experiences over the years and it seems to be the only practical way for all elements to do business." (Dep. 43)

Thus the bits and pieces quoted by CBS from Morris' deposition relate to the effect of the Warner experience on Morris, which leads him to view direct licensing with some apprehension. For example, immediately following the testimony quoted by CBS as to Morris' belief that it is in the best interests of publishers to have ASCAP perform the licensing function, Morris was asked,

> "Q Why do you believe that?
> "A History. I can relate to the past what happened. As an individual, it is quite different.
> "Q When you say history?
> "A I have been through this.
>
> • • •
>
> "• • • I am talking about the withdrawals of Warner's catalog, which to me is history and an object lesson." (Dep. 142-43)

And despite his apprehensiveness, and his view that publishers should license through ASCAP Morris testified that

he would of course want CBS' business and would negotiate for direct licenses with CTN producers:

> "Q How about the Columbia Broadcasting System Television Network? Do you think publishers ought to attempt to issue direct licenses?
> "A What price?
> "Q Whatever price they can get.
> "A *If they are talking money, my doors are always open.* If you are suggesting for the moment what I would say to that, I would say no, but *I would obviously talk to anybody that represented Columbia.* It is a big operation." (Dep. 139; emphasis added.)

And try as it might to put words in Morris' mouth, CBS was unable to persuade Morris that he would refuse to license CTN directly. For example, having established that Morris believes it more advantageous to have ASCAP perform the licensing function, CBS asked:

> "Q For that reason, you would be disinclined to engage in a direct licensing business, independently of ASCAP?
> "A My answer to that would be, what are you proposing?
> "Q No one is proposing anything.*
> "A Then there is no point of discussion." (Dep. 145.)

> "Q For these reasons, wouldn't you approach a possible direct licensing situation with a good deal of apprehension in terms of the possibility that this sort of thing, direct licensing, could spread and ultimately act to the disadvantage of music publishers and the Edwin H. Morris Company?
> "A I don't know where it would lead or what it would be. I can't tell.
> "Q Wouldn't you be concerned about it as a matter of business judgment?

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* This is one of several instances in which CBS seeks answers to hypothetical questions which lack essential information. Obviously when confronted with such a question one cannot give a realistic answer. Music publishers are businessmen; they like to deal with specific propositions; they believe that "Every situation is different." (Morris Dep. 118; see also Brettler Dep. 216-22) Businessmen do not like bidding into the wind.

"A I believe I would be concerned, but I can't predict what the outcome would be." (Dep. 148)

Morris nowhere said he would not deal directly with CTN. Although his Warner experiences made him think his business might fare poorly in a system of direct licensing,* he said he would listen to direct licensing propositions (Dep. 39), his door would be open for such propositions (Dep. 214), he would talk to the producers, either in his office or theirs (Dep. 212) and "of course" he wants CBS' direct licensing business.

Jerry Vogel: There is no way to capture the essence of Jerry Vogel's testimony by quoting snippets of his deposition; the transcript must be read in full. As CBS has quoted portions of the transcript, BMI will do so as well to counter the inferences CBS seeks to draw; however, the extracts cannot replace the transcript itself.

Jerry Vogel started in the music publishing business in 1910 (Dep. 13, 23). In 1910, the President of the United States was William Howard Taft. Henry Ford had begun selling his Model T, but had not yet developed the moving assembly line. Commercial radio broadcasting would not come for another ten years. And the founding of ASCAP was four years away. Improbably, Jerry Vogel is still in the business today. As Casey Stengel once said, "Most people my age are dead."

Jerry Vogel deals only in old songs (Dep. 13). He has acquired no new copyrights in the past dozen years. (Dep-14) He has no full time employees (Dep. 91-92). His promotional efforts are confined to mailings (Dep. 14-16, 22-23). Jerry Vogel goes back to the era when ASCAP was a kind

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* As to what a system of direct licensing would mean to other publishers, Morris did not know. On page 51 of its Proposed Findings CBS quotes this question, but deletes the answer given and follows it with a different answer. The answer to the question,

"Q So that for music publishers to engage in the direct licensing would worsen their position?"

was,

"A As an industry, I don't know what the result would be. I just couldn't contemplate." (Dep. 147)

of club. In reciting the advantages of ASCAP membership, Vogel said,

> "Well, it is very large now, but there was a time when it wasn't as large and they used to have a dinner every year. I think the members used to love to come to those dinners and meet their other composers, authors and composers and shake hands.
>
> "The same thing went for publishers, we met each other again, said hello and talked a few minutes. And if you are an old timer like me you like to meet those people." (Dep. 51; see also Dep. 68)

CBS quotes passages from Jerry Vogel's deposition in which he took the view that he would not be disposed to undertake the job of licensing CBS directly. In assessing the weight of these passages, the rest of Vogel's testimony must be considered.

Jerry Vogel today is an elderly man, anxious to be permitted to do business for the remainder of his life in the way he has become accustomed to, and reluctant to have to face new problems:

> "Well, I know what I have got and as I say it is just lucky that I have that extension* and I am not going to look for any trouble. *At 75 I am not looking for trouble.***
>
> "Q What kind of trouble would you expect?
>
> "A Well, * * * if I can continue to do what I do, I love what I am doing, if I can continue I would be very happy. And if I can't do it, I might as well close up the place, that's all." (Dep. 84; emphasis added. See also Dep. 66-67.)

At least a dozen times in his deposition, Jerry Vogel said he could not answer questions as to whether he would deal directly under the factual assumptions hypothesized by

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* Apparently meaning the series of recent bills annually extending the life of copyrights in the renewal term (see Dep. 14).

** This passage is reminiscent of the trial testimony of Miss Marion Mingle of the Harry Fox Agency. Miss Mingle said on cross examination that she would be "definitely disinclined" to accept a job offer from CBS; when asked why, Miss Mingle replied, "Well, my age, alone." (Tr. 885)

CBS' counsel (Dep. 62, 63, 65, 66-67, 68, 70, 71, 73, 77; see also Dep. 73, 78, 79, 82). Obviously upset by the hypothetical character of CBS' questions, Vogel said "* * * you want me to f[illegible] my imagination too far" (Dep. 71), and "I don't think I can answer that. You are reaching out for something that isn't here yet." (Dep. 75)

When asked what kinds of things he would want to know in deciding whether to deal direct, Vogel did not want to answer, saying:

> "Well, don't forget, I am 75 years old. I don't know how long I am going to be alive so I don't want to jazz the thing up. * * *" (Dep. 66-67)

In his testimony, Vogel said nothing to indicate any feeling that he had the power to give CBS a hard time; quite the contrary, he clearly regarded CBS as the big boy on the block:

> "You want me to say something about CBS, *I don't want to say anything wrong to CBS.* I don't want to put in the deposition anything about CBS. I am not happy with CBS, they don't go out of their way to help me. *They kick me around.*" (Dep. 70; emphasis added.)

When asked whether he would say 'goodby' if he did elect to quote a price to CBS, but CBS would not accept it, Vogel said,

> "No, I wouldn't say goodby. I would say next time. *I can't afford to fight. I just have to be nice to them.* But I can't let them have it for nothing." (Dep. 83; emphasis added. See also Dep. 78.)

Like anyone else, Jerry Vogel would make his decision about dealing with CBS when a real occasion arose involving concrete facts and circumstances (see Dep. 72-77). Speculation about what someone might do in a hypothetical circumstance—never very reliable—is, for the reasons stated, of particularly little worth in the case of Jerry Vogel. And certainly any conclusion which might be

reached about what Jerry Vogel would do cannot be extended beyond Jerry Vogel; Jerry Vogel is unique among ASCAP publishers today.

Eugene Goodman: Eugene Goodman of Jewel Music, the only one of the four deponents relied on by CBS to testify at trial, is given the least emphasis by CBS. Indeed, CBS ignores Goodman's trial testimony entirely, citing only answers given at deposition. Although the passages quoted by CBS in its post-trial papers are cited to the trial transcript, these passages are in fact excerpts from his deposition testimony which were admitted only for a "restricted" purpose for "whatever probative value" they might have (Tr. 1581, 1583). Basically, these passages deal with the question whether ASCAP members should deal direct with users to whom ASCAP has quoted a price. Goodman's answer to this somewhat abstruse question at trial was essentially affirmative, and his answer at deposition was essentially negative (Goodman Tr. 1556-87; 1631-32). Weighing speculation against speculation provides little on which to base a conclusion.

However, a more satisfactory form of proof as to what Eugene Goodman would do if confronted with a direct licensing opportunity is available: what Goodman did in the past. When approached by 3M for a direct license, Goodman dealt. Why? "To make money." (Goodman Tr. 1596-97, reaffirming Goodman Dep. 20) When asked at his deposition whether he regarded dealing with 3M as an act of disloyalty to other ASCAP publishers, he three times asked for an explanation of the question, and ended up saying, "I don't know what you are talking about." (Tr. 1597-98, reaffirming Goodman Dep. 25-26)

If confronted with an opportunity to direct license today, Goodman doubtless would, as he testified at trial, "treat it as any other business proposition." (Tr. 1557)

2. *The Testimony at Trial*

Every composer or publisher who testified at trial, except one, testified that he or his company was willing to deal

with CBS directly for performance licenses. The music publishers who testified were Salvatore Chiantia, Alan Chulman, Arnold Broido and Walter Dean.

Salvatore Chiantia is president of the music division of MCA. He stated that his preference was to deal with broadcasters through BMI and ASCAP (Tr. 2886), but that if CTN or its producers came to him directly for performance licenses he would certainly negotiate with them:

> "Q If CBS or a producer producing programs for CTN came knocking at your door—
> "The Court: Whose door are we talking about now?
> "Mr. Topkis: The MCA door.
> "Q —would you be inclined or disinclined to engage in conversation?
> * * * [Colloquy omitted]
> "A I would certainly engage in conversations.
> "Q Would you go so far as to engage in negotiations?
> "A If the conversation led to that, yes.
> "Q You are a member of ASCAP and you are affiliated with BMI?
> "A That's correct.
> "Q Would that membership and that affiliation in any way block or hinder your willingness to negotiate?
> "A Not that I know of." (Tr. 2884-86)

The major impetus for publishers to deal directly with CTN is a simple matter of good business sense. As Chiantia said,

> "My primary responsibility is to get my music played. To get it exposed. And if I have to go to CBS in a direct licensing scheme, I am going to go. I am not going to sit back and say, I hope you fail. I want you to use my music and I am going to try to make it work." (Tr. 2957)

> "There are only three games in town. I have to play one of three games. If we are talking about television, there are only three games in town. If I am effectively cut out from one, I only have two more to play with." (Tr. 2947)

Alan Shulman, Vice President of Belwin Mills Publishing Corporation, testified that he would be prepared to sit down and discuss direct licenses with CTN or its producers or representatives with the hope that those talks would lead to negotiations (Tr. 3089). Similarly, Arnold Broido, President of the Theodore Presser Company, stated that "of course" he would deal directly with CTN—he would have no choice but to deal:

> "Q • • •
> "Let us suppose there came a time when CBS no longer held licenses from ASCAP and BMI and came to you to negotiate or seeking to negotiate direct licenses with you for public performance of compositions in your repertory.
> "What would be your reaction?
> "A We would deal with them, of course.
> "Q Would you tell us why?
> "A Well, there is really very little else that we could do. We would have no choice in the matter. We would regret it because, obviously, it would be an inconvenience to us and we would regret the breaking of the relationship but we would deal with them." (Tr. 3492-93)

Broido also stated the view that

> "the publishers would by and large talk with CBS or anyone else who came to them." (Tr. 3498)

CBS describes composers Aaron Copland and John Green, who testified at trial, as having "profound reluctance" about change (Post-Trial Brief p. 48; see also Plaintiff's Findings p. 55). The actual testimony of these two composers, however, was that they and other composers would deal with CTN; they want their music performed on CTN, which is one of the principal outlets in the world for the performance of music, and they will do whatever they have to to accomplish that end. Copland testified as follows:

> "Q Now, it has been suggested in this lawsuit that in the event that the Columbia Broadcasting System Television Network for some reason or

another no longer held a license from ASCAP and BMI it might come to you, as an individual copyright proprietor, as an individual composer, and seek a license from you for the right to perform your copyrighted work or works.

"I would like to ask you, sir, whether if someone from Columbia came to see you you would be inclined or disinclined to deal with them or what would your reaction be?

"A Well, I think I would be rather regretful about the need to individually concern myself with the licensing of a particular work, since the present arrangement takes care of a great many of those chores, as I would think of them, and it seems a comfortable arrangement as it now exists, from our standpoint at any rate.

"Q If, however, the question were squarely put to you, will you deal with CBS or will you refuse to deal with CBS, what would your answer be?

"A Well, I think *my answer would be that of most composers*. If they want to get a performance, *they will do what is necessary to get the performance and if they have to deal with CBS, they would, I suppose, agree to deal with them.*" (Tr. 3485-86; emphasis added.)

John Green's testimony was that he and most other composers would deal directly with CTN for performance licenses:

"Q Mr. Green, suppose the following hypothesis. That CBS canceled its ASCAP blanket license and NBC and ABC continued to hold blanket licenses from ASCAP and suppose that either CBS or a producer of a CBS film series show came to you and sought to engage you to write the background and theme music for the show.

"Would you be inclined or disinclined to negotiate with him for the writing of that music?

"A I would be inclined to negotiate with him.

"Q Do you have an opinion as to whether other background writers and composers would be inclined or disinclined to negotiate with CBS or its producers in that situation?

* * *

"Q Do you have an opinion?

"A I know how I would like to answer that question. I don't have an opinion but I would be surprised if they didn't feel exactly as I do.

• • •

"Q Mr. Green, can you tell us why you would be inclined to negotiate with CBS or the producer of the CBS show in that situation?

"A For the following reasons. I like to think that part of my motivation is aesthetic and artistic, but I am also a fellow who earns his living by the making of music in various forms. I am also an artist who derives only secondary pleasure from thinking how great my music is when I hear it in my head.

"I like to hear it performed and I like to get paid for hearing it performed and you referred to CTN—would I be inclined to negotiate with CTN for the performance? Well, they are one of the principal outlets in the world for the performance of music and I want my music to be performed, I want the public to hear it, I want to get paid for it and I would be totally inclined to negotiate with anybody who would like to use it.

"Q Mr. Green, you have also told us that in addition to your work as a background composer you have written songs in your music career.

"Suppose in the situation we posited just a moment ago, CBS canceling its ASCAP license, suppose one of your publishers called you up and told you that the producer of a CBS variety show is interested in using one of your compositions, one of your songs, on a show, and he asked you for your opinion or view, would you be inclined to recommend that he license or negotiate with CBS or the producer or would you recommend that he not negotiate with CBS or its producer?

"A I would recommend that he negotiate.

"Q And why?

"A *Because I would want my song to be exposed* and I would also want to derive the revenue that would come from such a source as CTN for that exposure." (Tr. 3457-60; emphasis added.)

Confirming John Green's view that most writers would share his desire to have their music performed on CTN, Michael Dann, for many years CTN's head of programming, pointed out that the "average composer" is out of work, and will jump at the chance to score a television show (*e.g.*, Tr. 3276, 3278, 3280, 3372). Dann testified that even the most important composers

> "• • • all realized the importance of network television • • •." (Tr. 3275)
>
> "I have always found them intensely eager to have their works performed on the air as quickly as possible • • •." (Tr. 3276)

BMI President Edward Cramer, who over the years has had close contact with many writers and publishers (Tr. 4282-85), testified that in his opinion writers and publishers would be inclined, and even "quite eager", to grant CTN direct performance licenses (Tr. 4287-88).

Even the CBS witnesses who were composers testified that they would not refuse to deal with CBS directly for performance rights. Composer Burton Lane, former president of AGAC, testified that the desirability of direct licensing of performance rights to CBS would be determined by what kind of license terms could be negotiated (Tr. 1175-76). Lane testified, in the course of his 3M discussion, that

> "I would be certainly be willing to consider any deal that concerned my songs absolutely." (Tr. 1133)
>
> "• • • I must say that songwriters are very flattered more than they should be when someone wants to use their works or play their works. We don't get riled up if someone says, 'He would like to use what you have written.' We are delighted. It is just that we want to be treated fairly." (Tr. 1135)

Edward "Duke" Vincent, who has been on the production staffs of several network television shows (Tr. 571-72), was called by CBS to testify primarily about program produc-

tion. However, Vincent, who was a songwriter and is a member of ASCAP (Tr. 691), also testified that he would be willing to grant direct licenses for performance rights to his songs (Tr. 694-95).

All of these composer and publisher witnesses testified that they would be willing to grant performance licenses directly to CTN or other broadcasters. There was only one witness who said his companies did not want to have anything to do with granting licenses directly to CTN. This witness was CBS employee Walter Dean. The companies which Dean said would refuse to license CTN are April and Blackwood, two of the music publishers owned by CBS (Tr. 1815). And the copyrights on most of the music that April and Blackwood would refuse to license to CTN are owned by CTN (Tr. 1832-33; 1856-57). Dean's testimony is unworthy of belief.*

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*Walter Dean is also the man who testified to terms of agreements between CTN and April, and CTN and Blackwood (Tr. 1854-56). These agreements turned out to be non-existent when BMI subpoenaed them (see Tr. 4688-89 where Court ordered production).

It was also Walter Dean who testified that the performance of a song on network television rarely had the effect of increasing record sales (Tr. 1807-08). This testimony was squarely contradictory of CBS' previous answer to ASCAP Interrogatory 47, the first two sentences of which read as follows:

> "All performances of musical compositions on CTN enhance the value of the compositions so performed. Such performances popularize a composition, thereby tending to increase the public demand for phonograph records and sheet music of it, performances by other ASCAP licensees and distributions to ASCAP members."

This answer, dated June 2, 1971, was apparently given before CBS decided to patch up its antitrust case with a claim of "disinclination". Dean's testimony is also contrary to the views of all other witnesses in the industry (see pp. 89-97 below), and is contradicted by the representations of his own company, CBS Records, in the trade press:

> "REMEMBER THE SONG ANDY AND NOELLE WILLIAMS SANG ON TV THE OTHER NIGHT?
>
> 50 MILLION PEOPLE WILL.
>
> * * *
>
> IF CHRISTMAS PAST IS ANY INDICATION, WHATEVER ANDY DOES ON TV IS BOUND TO BE BIG IN JANUARY, FEBRUARY, MARCH . . ." (BX 171)

(3) *In Many Instances CBS Has In Fact Direct-Licensed Performance Rights to BMI and ASCAP Music.*

In addition to the compelling circumstantial evidence that writers and publishers would deal directly with CBS for performance rights, the record contains direct evidence of such dealing. Documents recently and reluctantly produced by CBS reveal that in many of the contracts pursuant to which CBS acquires CTN programs, CBS has either acquired performance rights to BMI and ASCAP music directly, or has required the producers to deliver those rights to it.

Both at deposition and at trial, CBS witnesses consistently claimed that CBS had never sought to acquire directly performance rights to music available through ASCAP or BMI, had never sought to acquire options on such rights in the event that CBS did not have licenses from ASCAP or BMI, and had never asked producers to deliver performance rights to music available through BMI or ASCAP (see, *e.g.*, Paley Dep. 46; Poklitar Dep. 176; Sipes Tr. 115, 155, 182-83, 304). However, CBS did not support this testimony with the actual contracts with outside producers or with composers hired for programs produced by CBS. Indeed, at all stages, CBS vigorously resisted defendants' efforts to require it to produce those contracts. The reason for this resistance is now clear: the terms of many of these contracts flatly contradict the testimony of CBS witnesses and the representations of its counsel.

Prior to trial, CBS had revealed the terms of only one contract with a producer. Excerpts from the contract for the Ed Sullivan Show were attached as an exhibit to a CBS affidavit submitted in opposition to BMI's preliminary injunction motion (BX161). This contract expressly provides that the producer does not convey performance rights to music in the ASCAP and BMI repertories. Before the resumption of trial in November, BMI subpoenaed contracts relating to programs listed on CTN program sched-

ules submitted by CBS, to ascertain just what kinds of rights CBS does in fact acquire.

During argument as to whether CBS would be required to produce the additional contracts subpoenaed by BMI, CBS' counsel represented to the Court that there were no other contracts giving CBS rights greater than those provided in BX161:

> *"They don't go any further than this.* In fact, there are a number of them that don't have any provision on this at all. *We have made some survey on it."* (Tr. 4696; emphasis added.)

Fortunately, CBS was required to produce at least some of the contracts sought. The contracts produced reveal that the testimony of CBS' witnesses and the representation of its counsel are just not true. In a large number of instances, CBS has directly acquired performance rights outright, or has directly acquired rights in the event that it does not hold ASCAP or BMI licenses.

Programs From Outside Packagers: The Captain Kangaroo children's show is by a wide margin the CTN program using the largest amount of identifiable music of outside publishers (see, *e.g.*, AX 287). The conspicuous lack of attention given this program by CBS at trial can be explained by reference to the terms of CBS' contract with Captain Kangaroo's producer. That contract places the burden of obtaining performance rights squarely on the producer. In Paragraph 14 of the contract, the producer warrants that all musical material used is either specially created material, material in the public domain, or material which the producer is "fully licensed to use," and that the use of the material "will not infringe upon or violate any rights of any kind or nature whatsoever of any person, firm, or corporation."* (BX 218)

For certain other programs, CBS' contract with the producer gives CBS the performance rights if CTN has no

* CBS is further protected by clauses requiring the producer to notify CBS of intended music use at least three weeks prior to production and to "delete such compositions as CBS may require to be deleted." (BX 218, ¶11(c)(ii))

license from ASCAP or BMI. The contract with the producer of four soap operas—Search For Tomorrow, Guiding Light, Edge of Night, and As The World Turns—is an example of such a contract. (BX 219, ¶12(b)) (See also BX 233, ¶12(g) (Carol Burnett) and BX 217, Ex. B, ¶8(a)(i) (Mary Tyler Moore), conveying performing rights to specially created music for such periods as CBS does not hold an ASCAP or BMI license.)

Finally, as to many shows for which it does not now directly acquire performance rights or options, CBS retains control over music selection so as to permit it to avoid music licensing problems. (See, *e.g.*, BX 235 ¶ 12(ii) (Young People's Concert), and BX 232, ¶ 5(iv) (Dr. Seuss on the Loose), requiring the producer to delete "such compositions as CBS may require to be deleted.")

Programs Produced by CBS: When hiring composers to write music for CBS-produced shows such as Gunsmoke or Secret Storm, CBS has been careful to make it clear that CBS is acquiring the performance rights to the music for such occasions as it may require them. Some contracts provide that CBS acquires all the rights to the music but transfers the performance rights back to the composer subject to certain limitations. Thus, in a contract for Gunsmoke background music, the grant back of performance rights is subject to the limitation that

> "*Neither the Producer, CBS nor any distributor nor the publisher shall,* under any circumstances, *be liable to Composer* or his successors in interest, *or to the* [*performing rights*] *Society* or its affiliated bodies, *nor shall the Producer, CBS or any distributor be liable to the publisher, for any payment of any sums by reason of performance of the music* as contained in the programs or motion pictures, or otherwise." (BX 215 A, ¶ III(e)(6) of Terms and Conditions; emphasis added.)

In a Secret Storm contract, the grant back of performance rights to the composer (Artist) is limited in this way:

> "If • • • CBS or any person, firm, or corporation non-dramatically performing the Music with CBS's

> permission shall not have a license from such performance licensing organization • • • covering such non-dramatic performance, then Artist hereby licenses CBS or such person, firm, or corporation to make such performance." (BX 221, ¶ 4(d))

On other occasions, CBS has not acquired all rights in the music; rather, it has permitted the composer to retain publication rights so long as the composer agrees to protect CBS' performances of the music, and agrees to share his performance royalties and other income from the music with CBS (see BX 214, Terms and Conditions, ¶¶ V, XI; BX 215C, Terms and Conditions ¶¶ V, XI; 6, Terms and Conditions ¶¶ V, XI).

Whatever the terms of the particular arrangement, CBS has made sure that special composers hired by it will not be in a position to "hold up" CBS.

Motion Pictures: For tens of millions of dollars worth of motion pictures that CBS has acquired the right to broadcast on CTN, CBS has negotiated contractual provisions for music performance rights. For example, contracts for films which CBS has inventoried at more than $32,000,000 provide that CBS is indemnified with respect to performance of music which is controlled by the licensor (BX 172; See PX 995, Ex. A for list of films with similar provisions). In most pertinent part, these clauses provide:

> "Licensor warrants that the non-dramatic performance rights in the music contained in the Picture are: (A) controlled by ASCAP or BMI or SESAC; or (B) are in the public domain; or (C) are controlled by Licensor or licensed to Licensor. *Licensor agrees to indemnify CBS against liability, loss, damage or expense arising out of the non-dramatic performance of the music in the Picture described in (C) above.* If music in (A) above is included in the Picture, CBS shall be responsible for obtaining a license to perform such music non-dramatically and if CBS fails to obtain or maintain such license CBS agrees to indemnify Licensor against any liability, loss, damage or expense arising from the non-dramatic performance of such music by CBS. • • •" (BX 172, ¶9; emphasis added.)

As the record indicates, it is the practice in the industry for motion picture producers to use the music of "in house" publishing companies to the extent possible (*E.g.*, Chiantia Dep. 41-43). And analysis of the music cue sheets furnished by CBS for the films covered by these contracts reveals that most of the films contain only music controlled by publishing companies affiliated with the licensor. Thus, as to most of these films—valued at $32,000,000—CBS already has contracted for performance rights independent of ASCAP and BMI.

Other CBS contracts covering motion pictures worth several million dollars more provide that performance rights are conveyed to CBS for any occasion on which CBS does not have an ASCAP or BMI license. If the rights are controlled by the licensor—and the cue sheets for most of them indicate that they are (see PX 994)—the licensor must give them to CBS without charge:

> "It is Licensor's understanding that during the Broadcast Periods CBS will hold a standard form of music license issued to CBS by ASCAP and by BMI covering the non-dramatic performance of the compositions of those performing rights societies but CBS makes no representation or warranty that CBS will continue to hold such licenses during each Broadcast Period hereunder. *If at any time during the Broadcast Periods CBS does not hold an ASCAP and/or a BMI license, the rights granted to CBS hereunder with respect to the motion pictures shall include non-dramatic music performing rights for all compositions in the motion pictures. It is understood that to the extent that such rights have or can be acquired by Licensor at no additional cost, Licensor shall pass such rights on to CBS at no additional cost to CBS.* If it is necessary for Licensor to incur additional costs in securing such rights, Licensor shall advise CBS and if CBS so requests, Licensor shall secure such rights subject to reimbursement by CBS of the additional costs incurred." (BX 181 ¶ 31. See PX 995, Ex. D for list of additional motion pictures covered by similar clauses).

As these contracts demonstrate, CBS is able to require program producers and special composers to give it performance rights in the event CTN holds no BMI or ASCAP license, and is able to acquire these performance rights without any payment at all to the producer or composer in the event the rights are exercised. Of course, the contracts for a number of programs do not provide CBS with performance rights. However, there is no evidence that CBS sought such rights and failed. Indeed, the inference to be drawn from CBS' reliance on speculation, its failure to present evidence of any refusal, and its reluctance to produce these contracts, is that CBS has never failed to acquire performance rights where it has sought them.

(4) *The very nature of the entertainment industry would motivate copyright owners to deal directly with CBS.*

In addition to the evidence that copyright owners have granted performance licenses directly to music users in the past, are dealing directly with CTN for such rights now, and would be willing to do so in the future, the nature and structure of the entertainment industry itself demonstrates that copyright owners would deal directly with CBS.

a. The Value of Network Television Exposure

In the eyes of writers and publishers, exposure of a composition on network television has a value far beyond the mere performance royalty thereby earned. The exposure through a television network performance is many times greater than that available through other media. However, the opportunities for gaining such exposure are limited because there are only three television networks, and there are few programs on the networks that can provide exposure for published music.

The fact is that the opportunities to promote the performance of songs through network television performances are quite limited (Shulman Tr. 3083). The overwhelming majority of television programs ordinarily use

only theme and background music, usually published by the producer of the program (Dean Tr. 1805; Shulman Tr. 3084; see AX287). The larger producers—those that evolved from the old line movie studios—often can fill their needs from their own catalogs in the relatively rare circumstances when they require a feature composition (Shulman Tr. 3084).

This situation is best summarized in a somewhat melancholy passage from Alan Shulman's testimony:

> "Q Are any of your promotional activities aimed at getting your music played on network television?
>
> "A Yes. But there are very, very limited number of opportunities to do this. For example, because of the number—well, they are limited pretty much to the variety shows that appear on the television networks and these are fewer in number of recent years than they were previously.
>
> "Q Why are your opportunities limited to the various shows?
>
> "A Well, because the other shows are basically prerecorded. Prefilmed, et cetera. The series, et cetera, are done and produced beforehand and the music that is performed and synchronized and used in those programs are pretty much controlled by the producers of the particular program.
>
> "And these producers, in fact, very often are publishers themselves who control the publishing rights and, naturally, are not too happy to use other people's music unless they absolutely have to because there is income from it." (Tr. 3083-84)

Leon Brettler described the task of attempting to get songs performed on network television as "not the easiest thing in the world." (Brettler Dep. 103)

There are literally only a handful of shows on the CBS network which provide regular outlets for feature music—the two evening variety shows and the Captain Kangaroo show in the mornings (see AX287, AX160(a)-(q)). Other networks, with talk show and rock concert programming, provide a slightly wider range, but overall, the network opportunities are quite limited (see, *e.g.*, Silverman Tr. 4764-65).

For those copyright owners who do manage to get their works aired on network television, however, the results are apparently a bonanza. Hardly a week goes by in the trade press that there is not some description, analysis or prediction of the sensational effects of television exposure on record sales.

For example, BX237 includes the following:

Cash Box quotes John Kiernan, Vice President of Marketing, RCA Records, following John Denver's ABC-TV special:

> "'Our initial reports from all around the country are absolutely staggering * * * The after effect-sales from showing of the special underscore that Denver is a super star and that national exposure on *TV is a mighty sales tool for a recordirg* [*sic*] *artist* * * *.'" (Cash Box, March 23, 1974, p. 12; emphasis added.)

Record World finds that 13 albums and 4 singles on the charts had their sales influenced by motion pictures or television; some excerpts:

> —"The current chart action of John Denver (RCA) is a good example of the power of the home screen, *even when the artist's work is performed by someone else.* * * *." Denver's recording of the song "found a new chart life" even though he had been featured "as a solely off-camera composer" of songs used in the TV program.
>
> —*"Even re-broadcasts of television shows are not without their chart repercussions.* Elvis Presley's first airdate for his NBC-TV special 'Aloha From Hawaii Via Satellite' (RCA) in April brought the album to the top chart spot * * *. But as a result of a re-run on Nov. 14, the album has once again begun an upward climb * * *.
>
> —"Jim Croce's 'Time in a Bottle' was originally issued on his first album * * *. As a result of its use on the soundtrack of the ABC-TV movie 'She Lives' * * * *again off-camera,* the song pushed the sales on the album into a second chart life even more remarkable than the first. * * *" (Record World, February 9, 1974, pp. 3, 43; emphasis added.)

RCA Records' Marketing Vice President Kiernan interviewed in Record World, comments on the effect of TV appearances on record sales:

> "It immediately shows up. Every time an artist appears on TV, again, the impact is immediate and very dramatic." (Record World, March 30, 1974, pp. 12, 30)

A Cash Box article reported the CBS telecast of a special film, "Sunshine", together with a "spot" commercial advertising the soundtrack album on MCA Records: "Record sales immediately following the airing were in excess of 50,000 and continue to climb with repeated promotional and advertising exposure." (Cash Box, December 8, 1973, p. 30)

A full page ad in Record World says that the song from the CBS "Sunshine" special "exploded following the telecast and has been newly recorded as a single (Record World, January 5, 1974, p. 2).

RCA records says in a full page ad in Record World picturing eight John Denver albums:

> "On March 11th over thirty million people will see John Denver on T.V.
>
> On March 12th a lot of those people will want to bring him home." (Record World March 2, 1974, p. 2)

The trade press carries reports that television exposure not only aids record sales, but increases sales of sheet music and helps to promote concert tours as well:

—Cash Box reports that 50,000 viewers of a CBS soap opera have purchased sheet music of the theme song; this led a recording group to record the song as the title song of their latest album (Cash Box, February, 1974, p. 41).

—Joshua White, a television producer with several rock concerts to his credit, says in a Record World interview,

> "If you have a record coming out in November or you're going on a tour in December, if you appear on 'In Concert' or 'Don Kirshner's Rock Concert' or 'Midnight Special,' even some of the smaller shows it's going to have a great effect on your sales." (Record World, January 5, 1974, pp. 6, 31)

CBS is well aware of the power of television to sell records. Prior to trial, CBS said in answer to an ASCAP interrogatory,

> "All performances of musical compositions on CTN enhance the value of the compositions so performed. Such performances popularize a composition, thereby tending to increase the public demand for phonograph records and sheet music of it, performances by other ASCAP licensees and distributions to ASCAP members." (BX 162)

And just a few days after this trial recessed, CBS Records took a full page ad in Cash Box to say

> "REMEMBER THE SONG ANDY AND NÖELLE WILLIAMS SANG ON TV THE OTHER NIGHT?
>
> 50 MILLION PEOPLE WILL.
>
> • • •
>
> IF CHRISTMAS PAST IS ANY INDICATION, WHATEVER ANDY DOES ON TV IS BOUND TO BE BIG IN JANUARY, FEBRUARY, MARCH . . ." (BX171)

Thus bombarded with reports in the trade press, writers and publishers make every effort to get their compositions onto network television programs. Witness after witness has talked of the desire of writers and publishers to obtain exposure for their music: Michael Dann (Tr. 3275-77), Al Berman (Tr. 972-73), Ned Washington (Dep. 62-63), John Green (Tr. 3457-60), Sal Chiantia (Tr. 2957), Burton Lane (Tr. 1135), Alan Shulman (Tr. 3085), Leon Brettler (Dep. 100-01, 300), Edward Cramer (Tr. 4285-86, 4288).*

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* Once again the only deviate from the prevailing industry view was CBS' employee Walter Dean, who said that "little if any" effort was made to promote the use of songs on television network programs (Tr. 1805). Of course, Dean had reached his conclusion without ever talking to a producer on the subject (Tr. 1857-58). Had he attended the trial, he would have heard contrary testimony by a producer called by CBS as a witness (see Wright Tr. 417-18, 492).

At deposition, Leon Brettler of Shapiro, Bernstein testified to his expectation that publishers would converge on networks seeking to grant licenses if ASCAP were to stop licensing. When asked if publishers would converge on television producers as well, Brettler replied,

> "Well, we are converging the producers now to try to get them to use our music." (Dep. 304)

Brettler summarized the attitude toward network performances in this way:

> "We consider it important in terms of exposure, people hear a song 30 million people hear it, some of them may go out and buy the record, the whole thing is locked in together." (Brettler Dep. 300)

Brettler also described the effect of exposure in some detail:

> "Very often a guest artist on a television show will do his last hit and say, 'I am going to do my next one being released on XYZ Company next week,' and he would kick off his record that way. There have been some classic cases of songs in one or two television shots live that became most instantaneous hits, the mail was tremendous. Somebody went into a recording studio and did it and released it as a commercial record." (Dep. 100)

He illustrated this point with an example in which CBS was involved:

> "• • • I might say from my own experience, Barbra Streisand had a special where she did Second Hand Rose and something clicked because something happened. You[r] clients, we couldn't exist without them, they went in and recorded Barbra Streisand on Second Hand Rose and it was an enormous smash, and it was her television spectacular that did this." (Brettler Dep. 100-01)*

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* CBS appears to be trying to have history repeat itself. It took two full pages in the November 10, 1973 issue of Cash Box to announce

> "On Friday, November 2, forty million people previewed the new Barbra Streisand album." (BX237)

The record is replete with examples of publishers' and writers' efforts to get their music onto network television. For example, CBS witness Robert Wright testified that the publisher of "Alive" from the musical "Applause" had sent an advance copy of the song to a staff member on The Carol Burnett Show in hopes that it would be performed on the show; Wright said "the publisher was anxious to have his music exposed" (Tr. 417-18, 492).

Alan Shulman of Belwin Mills testified to tireless efforts to encourage the use of music from "Pippin" on The Carol Burnett Show: personally contacting Robert Wright, sending lead sheets, sending demo* recordings, sending printed copies of the music, sending the original cast album, and getting Wright tickets for the show (Tr. 3085-86). Shulman also testified to his hope that his efforts to get a never-recorded song performed on Johnny Mann's Stand Up and Cheer show would prove successful, and said that he had had "quite a bit of success" in his efforts at getting Belwin Mills music performed on Captain Kangaroo (Tr. 3086).

Sal Chiantia of Leeds Music testified that he employs men who

> "contact the producers of variety shows and those people responsible for spotting musical compositions in shows and try to persuade them to use our songs." (Dep. 51-52)

Al Brackman of The Richmond Organization testified that his promotion-professional department employs a staff to, among other things, secure songs and

> "submit them to television artists, television producers, submit them to musical directors of television shows"

to try to encourage the use of songs (Dep. 56). Jerry Vogel promoted his catalog of old songs in promotional mailings sent three times a week to television producers and others (Dep. 13, 15-16, 22, 60).

* Demonstration records not made for commercial release but for distribution to persons who might be interested in performing or recording the song (*e.g.*, Brackman Dep. 58).

Nor are promotional efforts limited to publishers. E. H. Morris testified as to writer efforts to encourage use by television producers:

> "writers always play a part because of their friendship with these people and some writers are not reluctant to do this sort of thing." (Dep. 88)

Composer Cy Coleman testified that the staff of his publishing company had been

> "in constant touch with the Carol Burnett Show, calling them on the coast, sending them demos"

for Coleman's new musical, "Seesaw" (Dep. 21).

Coleman also gave a detailed account of the various techniques used by the publishers. On talk shows and variety shows, singers typically perform their current hits:

> "when a performer appears on the Johnny Carson Show they do things out of their own act." (Coleman Dep. 22; see also Vincent Tr. 624)

Since frequently a program's guest performers make their own musical selections, the publisher often directs his efforts towards persuading performers to use his music, and toward getting the performers who use his music onto the shows. Thus, one of the functions of the staff of Coleman's publishing company is

> "* * * getting performers, calling up the Peggy Lee's, and the Tony Bennetts who are sources now to do the kind of music, or these people that appear a lot on television * * *. That, in a sense, assures us of some kind of television performance if they like the material." (Dep. 22)

For example, a recent television performance by Diahann Carroll of "My Personal Property" from "Sweet Charity" was probably the result of efforts by Coleman and his staff. Coleman's staff had sent Miss Carroll at least four sets of demos of music from "Sweet Charity", and Coleman himself had been in touch with her (Coleman Dep. 22).

Leon Brettler also testified that if a performer uses a publisher's music in his act, the publisher will work to get the performer on television. This could take the form of encouraging the producer to use the artist, or supplying the artist with ideas to help him promote himself for a guest spot on a television show (Dep. 103-04). Indeed, publishers have gone so far as to create the program itself. Edwin Morris testified that the idea for the Harold Arlen special, "Get Happy", originated in his offices (Dep. 89-90).

The trial record establishes beyond doubt that network exposure is extremely desirable and highly sought after. The hard evidence therefore is entirely inconsistent with CBS' professed notion that writers and publishers would avoid it like the plague.

b. The Status of CBS

Obviously CBS is an important factor in the minds of composers, authors and publishers just by virtue of its ownership of a national television network. But CBS is much more than a television network, and its singular importance in the music industry suggests that few writers or publishers would have the temerity to refuse to negotiate with CBS for performance licenses.

CBS is the world's largest manufacturer and seller of records and tapes (Tr. 4615). CBS owns AM and FM radio stations in New York, Los Angeles, Chicago, Philadelphia, St. Louis, San Francisco, and Boston (CX 2, ¶ 18). CBS' FM station in New York has the largest audience of any FM station in the nation (Tr. 4616). In the first five cities just mentioned, CBS also owns and operates television stations (CX2, ¶ 2). Former CBS executive Michael Dann describes CBS as "the No. 1 outlet in the history of entertainment" and "the giants of the world in the use of music rights" (Tr. 3374).

No music publisher can afford to be in disfavor with CBS. Numerous witnesses in this record testified to the tremendous importance to a music publisher of obtaining a phonograph recording (Dean Tr. 1803-04; Chiantia Tr.

2871; Shulman Tr. 3079-80; Brettler Dep. 93-96; Chiantia Dep. 47-49; Coleman Dep. 16-17; Morris Dep. 77-80; see also Washington Dep. 14). There was general agreement that persuading someone to record a song is the principal method of exploiting a new composition (Id.). A trend toward performers' writing their own material has made it more difficult for non-performing writers to get songs recorded (Brettler Dep. 93). There is a great deal of competition among publishers to persuade record companies to record their material, and recordings are hard to come by (Brettler Dep. 94; Coleman Dep. 16-17). The music publisher's access to record companies is thus of critical importance. As Leon Brettler testified, "we are very interested in maintaining good relationships with record companies." (Brettler Dep. 95-96) The very last company that any music publisher would want a bad relationship with is CBS; it is the largest record company in the world (Tr. 4615).

CBS' influence persists after the recording stage. After a recording is made, music publishers employ agents to contact local radio stations around the country to encourage them to play the record (Chiantia Tr. 2871; Brettler Dep. 94-99; Morris Dep. 81-82). And at 14 stations in seven of the largest cities in the country, the name on the door is CBS (CX 2, ¶ 18).

Whether in radio, television, or records, CBS is a dominant outlet to the market for music. It would be "commercial suicide" for a music publisher to turn his back on CBS (Chiantia Tr. 3051).

c. Publisher Status

Often, a publisher's music relationship with CBS is not its only consideration. Many of the important publishers are—like April and Blackwood—units of large entertainment complexes. These firms often have relationships with CBS far transcending in importance any music licensing revenue they may receive from CBS.

Many of the named defendants or their parent companies are among those competing to sell television series and to license motion pictures to CBS (*e.g.*, Chiantia Tr. 2858-59; BX 181; BX 192; AX 124). Companies such as Paramount (defendant Famous Music), Universal (production arm of defendant MCA (Leeds Music)), United Artists (defendant Unart), defendant Warner Brothers, Screen Gems (defendant Screen Gems-Columbia Music, Inc.), and Metromedia (defendant Sunbeam Music), could hardly be expected to risk opportunities to sell programming to CBS for the sake of a few dollars in performing rights income.

That they would not take such a risk is clear from the terms of many of CBS' contracts with licensors of motion pictures. CBS' licenses to dozens of films from licensors such as Paramount and Metromedia provide in substance that if CBS has no ASCAP or BMI license, the licensor is deemed to have granted to CBS a free license as to all music controlled by it (BX 181, ¶ 31; PX 995, Ex. D).

d. Growth of BMI

CBS' argument that writers and publishers have an ingrained aversion to dealing with broadcasters outside of the protective mantle of the ASCAP trade association ignores the existence of BMI. Since CBS and other broadcasters founded BMI as a stock corporation owned entirely by broadcasters some thirty-five years ago, BMI has succeeded in persuading many thousands of writers and publishers to license their works through it rather than through ASCAP, a membership association of writers and publishers (PX-441; Cramer Tr. 4247-48). Indeed, today there are many thousands more affiliates of BMI than there are members of ASCAP (PX 441; Marks Tr. 2407-08). Almost all of the leading publisher members of ASCAP also own publishing companies affiliated with BMI (CX 2, ¶ 17). Since the majority of writers and publishers licensing performance rights have chosen to deal through a broadcaster-owned organization, it is hard to believe there is any kind of significant antipathy to dealing with broadcasters.

Even apart from performance rights, writers and publishers of music deal with broadcasters in a number of circumstances—for example, publishers deal with broadcasters for synchronization rights, dramatic rights and the like, and often writers contract with broadcasters to compose or perform music (See, *e.g.*, AX 265, an agreement between a composer and CBS News).

The theory that dealing directly with a broadcaster would inspire some kind of revulsion in a music publisher or writer simply has no basis in fact.

e. Other Existing Price Competition

CBS would have this Court believe that music publishers would decline to license performance rights outside of BMI and ASCAP because all they had ever known and become accustomed to was a world without price competition. Thus CBS' Proposed Finding 53 would have the Court rule that direct licensing is a "totally unfamiliar" system to publishers because

> "• • • the present system • • • insulates them from the 'unrestrained interaction of competitive forces' • • •."

This is simply not the case. The performing right is only one of several rights belonging to the copyright holder. In seeking to exploit their other rights, and in licensing performance rights for motion pictures, publishers regularly engage in active price competition.

Motion picture synchronization and performance rights: Motion picture producers generally acquire both performance licenses for exhibition in United States theaters and synchronization licenses in a single transaction (Mingle Tr. 852-53). Producers interested in licensing a song may call the Harry Fox Agency or contact the publisher directly (Mingle Tr. 858-59; Morris Dep. 116).

The record demonstrates that there are negotiations for motion picture licenses are characterized by price competition. The range of prices reached, according to Marion

Mingle of the Harry Fox Agency, is "very wide" (Tr. 869). When asked for his range of prices, publisher Edwin H. Morris said "There isn't any. Whatever is possible that we think we can get." (Morris Dep. 121) Producers sometimes shop around for a low price (Brettler Dep. 211; Mingle Tr. 868), and publishers often bargain with producers over price (Morris Dep. 19-20; Brettler Dep. 218; Mingle Tr. 876-77). Each side exercises the bargaining power that it has. As Leon Brettler explained, he might hold out for a high price when his position is strong and, on the other hand, "might go very, very low" if he got "the feeling that someone is shopping around and they can use any one of 50 songs on a cabaret scene." (Dep. 218; see also 225-26)

In sum, where motion picture performance and synchronization license negotiations are concerned, price is an important element of competition.

Television Synchronization Rights: Producers of television programs which are expected to be repeated also acquire synchronization licenses. Since a copyright proprietor can expect to receive performance royalties for network television performances, network repeats and, hopefully, syndicated local television and foreign television performances if his song is used, he may be reluctant to insist on a high synchronization license fee and thereby risk the producer's not using the song (Berman Tr. 927, 972; Finkelstein Tr. 3728-29).

After noting that payments for these performances come through ASCAP, Leon Brettler said,

> "We want to generate performances and it's our inclination not to make it too difficult to obtain a synchronization license, either by administrative details or by price, because our incentive is to have our things used." (Dep. 456)

This expectation of performance royalties apparently has made publishers less willing to bargain aggressively for television synchronization fees than they are in motion picture licensing where synchronization and performance

rights are negotiated together (see Berman Tr. 814, 927, 972). Thus, unlike motion picture license fees (Mingle Tr. 869-70; Brettler Dep. 210-18; Morris Dep. 118, 121; Brackman Dep. 66), television synchronization fees ordinarily are within a rather narrow range at a rather low level (Wright Tr. 428-429; Vincent Tr. 604-05; Sunga Tr. 748; Berman Tr. 817-20). However, there does exist price competition. Certain publishers seek higher synchronization fees as a matter of practice (Vincent Tr. 605; Sunga Tr. 748-49; Berman Tr. 928-29). Others will seek a higher fee where the use of a composition is very extensive (Berman Tr. 970). And in their turn, television producers will seek to negotiate a lower fee where the composition is to be used only briefly (Vincent Tr. 606; Berman Tr. 986-87).

All of the producers called by CBS testified to the existence of price competition in synchronization rights (Vincent Tr. 604-06; Wright Tr. 429-30a; Sunga Tr. 749-50). When these producers were unhappy with the amount quoted for a synchronization right, they either negotiated for a lower price (*e.g.*, Vincent Tr. 606; Sunga Tr. 749-50), or substituted another song (*e.g.*, Wright Tr. 429-30a; see also Sipes Tr. 172: "if it's too high, they won't take it.").

Mechanical rights: Record companies need mechanical licenses in order to record songs on a record or tape (Berman Tr. 775). There is a statutory mechanical license fee of two cents per song which operates as a maximum (Shulman Tr. 3081). Record companies will often bargain with publishers for lower mechanical license fees when the song has had no recent income, or when the song is to be included on a premium record, a record to be marketed over television, a budget record, or a record to be distributed through record clubs (Berman Tr. 831-37; Chiantia Tr. 2940-41; Shulman Tr. 3081; Brackman Dep. 54-55; Morris Dep. 166; Brettler Dep. 449-51).

Publisher Alan Shulman of Belwin Mills testified that CBS Records is one of his company's biggest customers for mechanical rights licenses at rates lower than the statutory rate:

"• • • the record company of the plaintiff here, Columbia Records and their special products division is the one where we negotiate most actively in terms of reduced rates from the statutory rate—with some difficulty, I might add." (Tr. 3081)

Each year, some twelve to fifteen thousand mechanical rights agreements are reached between record companies and music publishers for fees which are lower than the two cent fee provided by statute (Berman Tr. 831-33). Publisher Eugene Goodman testified that price competition on mechanical rights is "cut-throat" (Tr. 1561). Clearly, price competition is no stranger to the field of mechanical rights licensing.

The plain fact is that price competition is a daily occurrence in the business of a music publisher; any suggestion to the contrary is nonsense.

(c) There Is No "In The Can" Problem

Television programs or motion pictures which have already been filmed or taped are said to be "in the can". Music recorded on the sound track of such films or tapes is called "music in the can".

CBS asks the Court to find that CBS has in its inventory "at any given point in time" more than $100 million worth of programs or feature films "in the can". CBS asks the Court to find that if CTN attempted to obtain direct licenses from copyright owners, the copyright owners would "hold up" CBS with respect to music in the can, exposing CBS to the risk of losing more than $100 million (Plaintiff's Finding 45). CBS also asks the Court to find that there are commercials in the can which would not be directly licensable for CTN (Plaintiff's Finding 46).

CBS' "in the can" arguments have no merit. Analysis of the nature of music use on CTN programs indicates that for the vast majority of programs an "in the can" problem could not occur. Analysis of the provisions of agreements between CBS and many producers demonstrates that in many CBS has negotiated contingent or outright direct per-

formance licenses to BMI and ASCAP music, which completely eliminate the "in the can" problem. And analysis of historical evidence and practical considerations indicates that writers and publishers would not "hold up" CBS.

The evidence as to the sources of the music used in commercials and the useful life of commercials shows that the "commercials in the can" problem is a manufactured problem.

(1) *Programs in the can*

The nature and sources of the music used on CTN indicate that CBS is unlikely to be "held up" with respect to CTN programs in the can. Analysis of the ASCAP music used on CTN during the first quarter of 1972 shows that 83.6 per cent of CTN programs used no identifiable music of outside publishers. Such music as was used on those programs typically was owned by a publisher affiliated with the program's producer or the special music composer for the program, or by CBS itself (AX287, AX160(a)-(q), PX541, PX544). Thus, for the overwhelming majority of CTN programs, the packager from which CTN acquires the programs could provide direct licenses. Considering the very competitive nature of the market for the production of network television shows (see Chiantia Tr. 2909), there is every reason to believe that packagers would be willing to grant CTN music performance licenses if that were required in order to sell programming. Similarly, the licensors of motion pictures doubtless hope to continue to license movies to CBS in the future. There is no basis for supposing that these producers would wish to jeopardize such valuable relationships by refusing to grant CTN licenses.

Indeed, CBS has obtained performance licenses, contingently or outright, from many motion picture licensors and program packagers, often without charge. And there is no evidence that there were any attempts at "hold ups" in the acquisition of these rights.

A number of the contractual provisions granting CBS performance rights have been analysed in detail at pp. 84-

89 above; they will not be further discussed here except to note that they serve to reduce very substantially the inventory figure of $100,000,000 claimed by CBS.* More than $32,000,000 of this inventory consists of motion pictures licensed to CBS under contracts providing that the licensor must indemnify CBS with respect to performances of music controlled by the licensor. And analysis of the music cue sheets for these films shows that most of them contain only music controlled by the licensor (PX994). Since CBS is fully licensed to perform such films without BMI or ASCAP licenses, these pictures cannot properly be included in CBS' in the can inventory.

Another group of films inventoried by CBS at several million dollars are licensed to CBS under contracts providing that performance rights are included in the license if CTN is not licensed by BMI and ASCAP, and that CBS need pay nothing for the rights if they are controlled by the licensor (see, e.g., BX181 ¶ 31; PX995, Ex. D). Again, the cue sheets indicate that most of these films contain only music controlled by the licensor (PX994).

In addition, contracts covering more than $10,000,000 worth of films provide that if CBS finds that performance rights are not clear as to any film it can exclude that film from the contract (see BX183, BX192; see PX995, Ex. C for list of films covered by similar contracts). Since CBS would have no obligation to use and pay for such films they cannot properly be regarded as being "in the can".

The impact of these and other contractual provisions on CBS' claims is substantial: CBS' "in the can" inventory figure is overstated by many millions of dollars.

As to programs for which CBS has not already acquired performance rights, there is no basis for supposing that writers and publishers would "hold up" CBS for exorbitant performance royalties. The facts show the contrary.

*The $100,000,000 figure itself is inflated. Although Sipes represented that this valuation was based on cost (Tr. 223-24), the Baker affidavit reveals that CBS has had to redistribute its costs in proportion to expected income in order to reach this figure (see PX995, ¶ 6). The contracts themselves indicate that the value of the CTN inventory at cost is in the area of $84,000,000.

To achieve financial success, a music publisher must obtain a very large number of uses of his works, for the sum received in respect of any individual use is rather small (see PX470). For this reason, a publisher would never seek to make a "one shot killing" where the effect would be to jeopardize future uses; a "hold up" fee of even ten times the normal rate would not be attractive if it would cause the user to look elsewhere for his future needs. Moreover, the stakes are frequently hundreds of times higher than the amount of music performance royalties since many of the leading publishers are parts of large organizations in the business of selling programming to CTN which could bring them many millions of dollars.*

Music publishers recognize that if they were to try to hold up CBS on music in the can it could destroy their prospects of getting their music performed on CTN programs in the future. As Sal Chiantia put it,

> "We know that we are in this business and we intend to stay in this business and the way we stay in the business is by establishing some kind of a rapport and good will with our users and customers." (Tr. 2896)

Chiantia stated that with respect to music in the can,

> "I would say that I would expect to deal no differently with that material than I would deal with material which CTN would want prospectively.
>
> "Q Why is that sir?
>
> "A Well, I assume that if CTN has no license with ASCAP, they are going to be knocking on my door or I will be knocking on their door sometime in the future for the use of my material and I certainly don't want them to slam the door in my face, do I?" (Tr. 2890-91)

> "We want the door to remain open for us and if you start holding up record companies or the people with whom you do business, you are in real trouble." (Tr. 2898)

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* See pp. 98-99 above.

If CTN came to Chiantia's company for a direct license to music already in the can, Chiantia's opinion is that his bargaining power would not be appreciably greater than it would be if the music was not already in the can (Tr. 3046-47). He reiterated the reason as follows:

> "• • • it would be suicide for any publisher to refuse to license or to be difficult in a case like that. He will be committing what we used to call commercial suicide. There are kooks everywhere. There are one or two publishers that would probably do it but don't paint us all with the same brush. It would be suicide." (Tr. 3051-52)

> "• • • In your dealing with customers and dealing with users, you've got to establish the fact that you are a reasonable person and a person to whom they can speak. Now, for example, if you gave the example before of a premium record. Now, if I showed that record company that I was unreasonable, they would just never consult me anymore. They would just cut me out of their program completely.
>
> "I don't want that to happen. I want them to continue to use my material. That is what I am in business for. So I have got to establish with them what my policy is and they have to be convinced that my policy is reasonable vis-a-vis their company.
>
> "If they are convinced of that, they will continue to use my music.
>
> "If I behave like a slob, then my music is not going to be used. It is as simple as that." (Tr. 3056-57)

In his deposition Edwin H. Morris was asked if he might not try to "press" his "advantage" if CBS came to him for a direct license for music in the can. Morris' answer, in part, was:

> "• • • wouldn't it be stupid for me to try to hold you up in the future for something that could do us both good. I don't see that." (Dep. 254-55)

Leon Brettler testified at deposition that motion picture producers try to knock his prices down "with suggestions

that there are other things he can use us for * * *" (Dep. 222). With respect to television, Brettler pointed out that there are, after all, only three networks and that a publisher could not afford the danger of being blacklisted by one of the networks because he had been uncooperative on royalty rates:

> "It would be very nice if * * * there were ten or twenty television networks or 100 or 1000 small television networks and if we couldn't make a deal with CBS * * * you would be successful somewhere else * * *.
>
> "If one record company turns down a record we have * * * a tremendous number of avenues to turn to. If we are rejected by CBS, NBC or ABC for any reason, including blacklisting because we are uncooperative on rates—this has been known to happen in other industries." (Dep. 305)

Further, publishers have had many opportunities in the past to "hold up" their customers with regard to synchronization rights to music already in the can, yet they have not done so. Alan Shulman of Belwin Mills testified that there are frequent occasions when a producer requests a synchronization license after the composition has been taped or recorded. On these occasions the price his company asks is "pretty much the same as we would ask for before the fact." (Tr. 3082-83) Similarly, Chiantia testified that whenever he has been contacted for synchronization licenses after the music has been put in the can, his company has never held up anybody because it would be bad business practice:

> "I believe the question here is whether a music publisher would take advantage—let us discard the term holding up—whether a music publisher would take advantage of a situation in which something has already been recorded and a license is subsequently sought.
>
> "There have been any number of occasions when that has arisen in the licensing of mechanical reproduction and in the licensing of motion pictures, theatrical motion pictures.

"Very often, a theatrical motion picture will be made and the song recorded and the synchronization license is subsequently sought. In those cases, speaking for MCA, we have never held up anybody. We have never been unreasonable. We have licensed.

"In the cases of mechanical reproductions, there are cases in which recording companies actually record a song before ever asking for a license. In those cases we would certainly hold them up if we wanted to, but we don't because it would be bad business practice." (Tr. 2895)

And Harry Fox personnel, who are familiar with the bulk of these transactions, testified that the normal industry practice is not to charge higher prices when the music is already in the can. Both Albert Berman and Marion Mingle said that post-production synchronization licenses are generally arranged amicably (Mingle Tr. 884; Berman Tr. 966). Berman testified that where synchronization rights are sought after the music is in the can,

"My experience has been that the publisher has always charged the normal rate he would have charged in the first place." (Tr. 967)

CBS brought out through Berman that these requests by producers are fairly common (Tr. 979-82) and that producers feel free to make such post-production requests because

"• • • there is a certain confidence on the part of producers that they will not be held up by publishers when they want to use a song after the fact.

"Q Do you have any opinion as to what the basis is for that confidence?

"A The basis is that the users and providers of music have to live together. Nobody wants to lock himself up in a closet and not have them used. The producers are aware of that. It is a common interest that would prompt this type of action." (Tr. 981-A-982)

Thus the writers and publishers have testified that they would not "hold up" CBS; they have not held up their

customers in similar circumstances in the past; they would have far more to lose than to gain by so doing and they obviously realize that. Professor Steiner concluded,

> "• • • people are in the business of selling music, are selling music rights for performances over and over and over again.
>
> "They are, if you like, in an industry where there are repeated uses of their music. They are in the business not for one killing but for a long, long time. They know that the people who buy their music have memories and if they held them up or were regarded as having held them up, they would be likely to suffer in the future. • • •" (Tr. 4401)

There is, as Professor Steiner said, no basis for inferring that people

> "• • • who want to have their works purchased in the future would be so short-sighted as to attempt—as to attempt to refuse to deal on a reasonable basis." (Tr. 4403)

Finally, if there is any "music in the can" problem at all, it is one that CBS created for itself. To the extent that there is music in the can which is not licensed for public performance except through BMI or ASCAP licenses, it is because CBS or its producers put it there. For a portion of the CTN inventory CBS has had the foresight to acquire performance rights directly for any period in which CTN does not hold BMI or ASCAP licenses; and for a portion of its inventory it has not. That CBS in some cases may have made no provision for performance licenses apart from BMI or ASCAP before putting programs in the can is not the fault of writers, publishers, or performing rights organizations. It is the fault of CBS.

In any event, even if copyright owners would hold CBS up, and even if the inventory were worth the one hundred million dollars that CBS claims, the contention that CBS would be risking this sum is just so much bombast. The risk is not what CBS paid for the program, it is what it would cost it to use the music. If CBS did not wish to

infringe, it could take a per program license from BMI or ASCAP at a small fraction of the cost of the program (see BX 114; Steiner Tr. 4402-03). Alternatively, CBS could simply perform the song and take the risk of being sued for infringement. If sued, CBS would be held liable for the fair value of the performance of the music, which would hardly amount to the cost of the entire program or motion picture.

(2) *Commercials in the can*

As its witness with respect to its claimed problem of commercials in the can CBS called Marion Preston, a vice president of J. Walter Thompson Company ("JWT"). Miss Preston testified that JWT produces more than 1300 television commercials a year (Tr. 1868), and that the music used in commercials comes from four sources: (1) copyrighted music, (2) original music composed specifically for the commercial, (3) public domain music, and (4) canned or "stock" music obtained from background library services (Tr. 1869). Miss Preston testified that except for seasonal commercials the average life of a commercial might be "between six months and maybe eighteen months" (Tr. 1873).

Asked by CBS what it would mean to JWT if it were "advised tomorrow" that CTN "no longer had an ASCAP or BMI performance rights license" (Tr. 1874), Miss Preston stated that a number of its commercials could not be used on CTN (*Id.*), that attempting to obtain performance rights from composers might be expensive, and that JWT "could certainly consider the possibility of trying to terminate" "some of" its commitments on CTN (Tr. 1877).

Upon further inquiry by defendants, it developed that by far most of the music used in JWT's commercials is composed specifically for the commercial or for the advertiser by writers on JWT's staff. In 1972 JWT produced and had broadcast at least once, a total of 307 television commercials which used music* (AX263, AX264). Of the

* Not including "the relatively small number" of commercials prepared in its two west coast offices (AX263).

307, 190 used original music composed specifically for the commercials or advertiser; only 21 used copyrighted music, 15 used public domain music, and 81 used stock music (*Id.*). Thus, of JWT's commercials which used music, 61.6% used music that was specially composed. Only 6.8% of the commercials which used music used copyrighted compositions, and 27.5% used stock music from background music libraries.

As small as these percentages are for copyrighted music, on an overall basis they are highly inflated because they use as a universe only the number of JWT commercials that used music (307), rather than the total number of JWT commercials (1300) (Preston Tr. 1868). In overall perspective, therefore, fewer than 1.6% of the JWT commercials used copyrighted music, and fewer than 6.2% used music from background libraries.

Furthermore, AX264 reveals that those 21 JWT commercials that used copyrighted music used a total of only six compositions. There is no basis for assuming that the publishers of those six compositions would hold up JWT. The only evidence in the record shows copyright owners to be willing to grant licenses on a reasonable basis for programs in the can (see *supra*) and for commercials in the can (see Chiantia Tr. 2986). And if JWT could not get the rights to six songs, the world would hardly come to an end.

With respect to the 190 commercials which used specially composed music, it is hard to believe that JWT's employees would hold up JWT for exorbitant rates for performance licenses. Indeed it appears that JWT must already have the performance rights to much of that music because it was revealed on cross examination that of the writers on the JWT payroll, "There are a great many who are not members of either" BMI or ASCAP (Tr. 1898-99).

Finally it must be noted that CBS asked Miss Preston what the effect would be if JWT were advised "tomorrow" that CTN had no BMI or ASCAP license (Tr. 1874).*

* This was a common CBS tactic, to ask the effect of a "sudden" or immediate change in operations, without benefit of the normal

The concerns Miss Preston expressed for what would happen if JWT were so informed "tomorrow" are wholly irrelevant. The fact is that commercials have a life span which is at most six to "maybe" 18 months, and is shorter for seasonal products (Preston Tr. 1873; see Dann Tr. 3287 —six months to nine months, and a maximum of one year). If CTN gave reasonable notice of the cancellation of its BMI and ASCAP licenses, there would probably be no commercials in the can for which performance rights had not been acquired by the time the cancellation took effect.

Considering that the great bulk of the music in commercials is specially composed and therefore easily licensable directly, that only 1.6% of all JWT commercials even use copyrighted compositions, that they used only six such compositions and that commercials have such a short useful life that normal notice would allow direct licenses to be obtained, CBS' "commercials in the can" problem is obviously a fiction.

B. The Availability Of Alternatives To Blanket Licenses Defeats CBS' Claims Of Restraint Of Trade.

CBS has identified three "per se pigeonholes", (Post-Trial Brief p. 56), into which it attempts to fit defendants' practices. These are: (1) concerted refusal to deal; (2) price-fixing; and (3) tying (a) of "accessible" to "inaccessible" music, and (b) of "unwanted" to "wanted" music. Basic to CBS' contentions on all three claims is its postulate that writers and publishers would not deal with it for direct licenses. That hypothesis is demonstrably false.

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amount of notice one would expect rational businessmen to give for a change of such a magnitude (see also, *e.g.*, Wright Tr. 463; Dann Tr. 3369, 3431; Steiner Tr. 4457). For its own purposes CBS apparently needs one year's notice (see *e.g.*, Sipes Tr. 79-80; see also Hruska Tr. 120-21).

As Michael Dann said:

> "In the television business I would recommend we not do any radical changes for tomorrow. I mean, it doesn't make sense to change something that quickly, over 24 hours, never. I wouldn't cancel a trucking contract over 24 hours." (Tr. 3431-32)

1. There Is No Concerted Refusal To Deal.

Despite CBS' claim that this case falls into the concerted-refusal-to-deal pigeonhole, CBS cannot cite any evidence that writers and publishers would refuse to deal with it. What CBS argues is that writers and publishers "are effectively refusing to deal" by having joined ASCAP or having become affiliated with BMI (Post-Trial Brief p. 58). The facts are quite to the contrary.

Members of ASCAP give ASCAP only *non*-exclusive rights to grant licenses to their works, and remain free to grant licenses directly to any user who troubles to seek them. This is in accord with the ASCAP consent decree (Ex. 10 to CX2). Although the form of the BMI consent decree provision permitting direct licensing differs from that of the ASCAP decree, CBS has stipulated that BMI writers and publishers are as free as ASCAP writers and publishers to grant performance licenses directly to CTN (CX3).*

Since ASCAP and BMI writers remain free to license users directly they have not "effectively", or otherwise, refused to deal with CBS. According to CTN vice president Sipes, CBS never once asked any BMI or ASCAP writer or publisher for a direct license (Sipes Tr. 155), not even in the first half of 1970 when CTN was using BMI music without any performance license (Sipes Tr. 304).

Lacking the necessary condition precedent of having itself made any request that has been refused, CBS has sought to infer the likelihood of a concerted refusal to deal from the events it likes to refer to as "The 3M Incident". However, far from suggesting any likely concerted refusal to deal, the eminently successful 3M experience in obtaining performance licenses suggests that most writers and publishers would in fact deal with CBS (see pages 42-66 above). When 3M sought direct licenses, it concluded agreements with 27 out of the 35 publishers it solicited; and five of the 8 with whom no contract was signed later reopened nego-

* CBS' footnote on p. 58 of its Brief, apparently attempting to single out BMI affiliates, is unaccountable in light of the CBS stipulation.

tiations with 3M, three of whom reached agreement with 3M only to have 3M itself back off. 3M obtained direct licenses for all the music it needed and its project was an outstanding success. The 3M experience shows a willingness to deal.

The testimony from writers and publishers at trial and in depositions confirms their willingness to deal with CTN directly. Messrs. Chiantia, Shulman and Broido stated unequivocally that their publishing companies would be willing to negotiate with CTN directly for performance licenses (Chiantia Tr. 2884-86, 2942, 2948, 2955, 2957-58; Shulman Tr. 3089; Broido Tr. 3492-93). Aaron Copland and John Green stated clearly and unambiguously that they too would be willing to negotiate with CTN (Copland Tr. 3486; Green Tr. 3460). Edwin H. Morris testified at his deposition that if CTN cancelled its ASCAP license and came to him for a direct license his door would be open (Dep. 214); he "would obviously talk to anybody that represented Columbia. It is a big operation." (Dep. 139) In similar circumstances Leon Brettler testified that his company too would negotiate some provision for performing rights (Dep. 184-85). Even Edward "Duke" Vincent, erstwhile songwriter turned producer of CTN programs, testified at trial that he would grant CTN a direct license (Tr. 694-95).

The testimonies of the writers and publishers themselves that they would deal with CTN is supported by the opinions of expert economists and of industry experts. Edward Cramer, president of BMI, who has had close contact with many writers and publishers over the years, was of the view that they would be inclined to deal with CTN (Tr. 4287). Similarly, Michael Dann, for many years CBS' Vice President in charge of programming described even the most important composers as "intensely eager" to have their works performed (Tr. 3276). He testified that he could not conceive of their refusing to deal with "the No. 1 outlet in the history of entertainment." (Tr. 3374)

Given the hypothetical question as to how writers and publishers would be likely to react if CTN announced its cancellation of its BMI and ASCAP licenses and established an office for the acquisition of direct performance licenses, economist Peter Steiner testified:

> "I think they would line up at the CBS or CTN window to register their willingness or their terms or the person who is available to negotiate for them." (Tr. 4396)

Professor Steiner drew this conclusion from the fact that

> "they are in the business of selling their music and CTN is a major user; if that's the way they are going to buy music performance rights, these people I think don't want to be shut out." (Tr. 4397)

As to CBS' professed fears of a concerted refusal to deal, Professor Steiner said:

> "I don't know if I agree whether they are afraid or not. I don't believe their fears are justified. I think there is a great deal of evidence that suggests that people would deal, they want to deal, and I guess the phrase that sticks in my mind from the testimony, Mr. Brettler's I think, about putting on his first and foremost hat and I think first and foremost these copyright holders want to have their music performed and they want to sell those rights and I think they would not refuse to sell them for that reason." (*Id.*)

The overwhelming evidence is that writers and publishers, if asked, would license CTN directly.

CBS cannot make out a case on the basis of a mere belief that it would be boycotted if it tried direct licensing; the law requires it to try. Without ever having given the writers and publishers a chance to deal CBS cannot succeed on its claim or refusal to deal. See, *e.g.*, *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246, 251 (2d Cir. 1959), *cert. denied*, 361 U.S. 885 (1959); *Webster Rosewood Corp.* v. *Schine*

Chain Theatres, Inc., 263 F.2d 533, 536 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959); *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F.2d 561, 568 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1133 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

In the first three cases cited the plaintiff claimed that the defendants had conspired to deprive it of "first run" motion pictures. In the *Royster Drive-In* and *Webster Rosewood* cases, judgment was entered for the defendants because of the plaintiff's failure to make a demand to the distributor for such pictures. In *Milwaukee Towne Corp.* v. *Loew's, Inc.*, the Court of Appeals reversed the district court's finding of fact that there had been such a demand as to one of the periods of alleged injury (190 F.2d at 566-67), and reduced the plaintiff's damage award accordingly (*Id.* at 573).

In the *Royster Drive-In Theatres* case the plaintiff argued that its failure to make a demand should not be considered fatal, on the theory that its demands would have been refused because the "policy" of the defendants was to give another theatre the good pictures (268 F.2d at 251). The Court of Appeals for the Second Circuit rejected this argument, stating that the distributor was entitled to be confronted with a clear demand (*Id.*).

In *American Manufacturers Mutual Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1133 (2d Cir. 1967), the plaintiff ("Kemper") sought to sponsor news programs over the defendant's television network, and had written to the defendant asking for less than a full line-up of stations. Kemper eventually sponsored the full line-up, and brought suit complaining of the defendant's refusal to deal for a limited number of stations. The Court of Appeals affirmed judgment for the defendant, upholding a finding by the district court that the plaintiff had "'acted unreasonably in failing to negotiate further'" with the defendant after its initial efforts to persuade the defendant to eliminate the undesirable stations had not succeeded.

Since CBS has never made any request for a direct license that has been refused, its claim of concerted refusal to deal has degenerated into claims of "disinclination" to deal directly (Post-Trial Brief pp. 41-42), "antipathy" toward direct licensing (*Id.* p. 6), "preference" for dealing through ASCAP (*Id.* p. 43), "reluctance" to change (*Id.* p. 48), "regret" at having to deal directly with CTN (*Id.* p. 43), and "hesitance" (*Id.* p. 44).

The antitrust laws, however, deal with refusals, refusals of specific, good faith requests. They do not deal with inclinations and attitudes and preferences, for whatever a person's attitudes or inclinations might be, he may still agree to deal *if he is asked.* Perfect witness to this is the history of the relationship between 3M and Leeds Music, the MCA subsidiary.

CBS has emphasized that MCA executive Sal Chiantia had a "preference" that 3M obtain its performance licenses from ASCAP rather than directly from publishers (Plaintiff's Findings p. 89). CBS has characterized other MCA executives as having "considerable misgivings" about granting direct licenses (*Id.* p. 87). In effect CBS' counsel even made an offer of proof that MCA's attitude went deeper than just a preference for licensing 3M through ASCAP and "that this particular company's reaction to the 3M matter was really a great deal more emotional, the feeling went very deep." (Tr. 3020-21)

There is no question that Chiantia preferred that the licensing be done through ASCAP; there is no question that his superiors at MCA also preferred that. Chiantia so testified (Tr. 3014-19). ***But the fact is that when the time came for action, MCA did grant 3M performance licenses*** (Arrow Tr. 1353-54; 3MPX52). Indeed Chiantia went further: he personally helped to line up other publishers to grant performance licenses directly to 3M. 3M's attorney Allen Arrow testified as follows:

> "3M had felt that Mr. Chiantia had been very helpful in discussing the 3M direct licensing program with other publishers.

"From time to time we were asked by other publishers who else is entering into this program; and because of Mr. Chiantia's articulation and his representation in the field, we would generally refer these inquiries to him or to Mr. Brettler of Shapiro Bernstein. • • •

• • •

"I think Sal in particular took a lot of time in explaining the situation to other publishers • • •." (Tr. 1373-74)

Thus, although now attacked by CBS for its preferences, emotional reactions and attitudes toward licensing 3M, MCA did not refuse to deal. It dealt. And it persuaded others to deal.

Leon Brettler of Shapiro, Bernstein presents a similar case; he admittedly preferred dealing through ASCAP but he did grant 3M a direct license (see Dep. 331, 335-36). Thus Professor Steiner quite accurately drew the line between attitude and action in responding to a CBS question as to whether the attitudes of publishers would be "very hard, indeed against direct licensing CTN producers":

"A I think they might genuinely regret the situation. I think they might do many things about it.

"The thing I think they would not do is to refuse to deal.

"• • • however much Mr. Brettler worried about this [3M licensing], he put on his first and foremost hat and signed the deal because he wanted the income." (Tr. 4454)

The overwhelming evidence in this case is that if CTN instituted a policy of direct licensing, writers and publishers would deal with it. CBS has never been refused a direct license, and it cannot support a claim of concerted refusal to deal by selective quotations and questionable characterizations designed to depict writers and publishers as having a negative "attitude" toward CTN. As the court said in *La Rouche* v. *United Shoe Machinery Corp.*, 166 F. Supp. 633, 635 (D. Mass. 1958), in dismissing a complaint

of antitrust violations by the defendant for, among other things, "its attitude toward the plaintiff,"

> "• • • no law has been ó. sed yet which subjects a corporation to damages for its attitud- toward a particular person."

2. There is no price fixing.

The essence of price fixing, says CBS, is "an agreement among competitors not to compete on a price basis." (Post-Trial Brief p. 56) CBS asserts that there has been price fixing in this case, even though it concedes that this is not a "classic" case,* and that all that has happened is that writers and publishers have given licensing organizations the rights to license their works together and distribute the proceeds.

CBS' price fixing claim has no merit in fact or in law. Writers and publishers remain free to license all users directly; there is no evidence whatever of an agreement among them not to compete on a price basis if anyone asks them for direct licenses. And indeed price competition, as well as other forms of competition, does exist.

Since 1931, it has been settled that the legality of pooling activities is to be measured by the rule of reason. *Standard Oil Company (Indiana)* v. *United States*, 283 U.S. 163 (1931). When pools have been accused of unlawful pricing activities, one factor in favor of upholding them as within the rule of reason has been the existence of an alternative way of licensing the components of the pool. In *Standard of Indiana*, the Supreme Court upheld a patent pool against Government charges that the effect of the pool was to maintain or increase royalty rates, on the ground that the patent owners were free to issue licenses under their own patents or under the patents of all the others. Similarly, the availability of the direct licensing alternative for music users

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*CBS states that the classic form of a price fixing agreement would be for music suppliers to agree among themselves "to charge television networks $300 for each feature use." (Post-Trial Brief p. 56) This is indistinguishable from what CBS seeks in this action.

led the Ninth Circuit Court of Appeals to hold that the activities of ASCAP and its members did not constitute price fixing under the Sherman Act:

> "There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees and the right of such prospective licensees to seek individual arrangements, are fully preserved." *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1, 4 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

Since all BMI and ASCAP writers and publishers remain free to grant public performance licenses directly to any user (Ex. 10 to CX2; BX114; CX3), CTN is perfectly free to ask writers and publishers for direct licenses and to negotiate with them for prices.

Even if CBS has never sought a price quote for a direct license, that would not mean that price competition does not exist. It is the *availability* of direct licenses that constrains the prices that can be charged for other forms of licenses. As Professor Steiner pointed out, price competition can exist even if only one price has been quoted because

> "It is not the number of prices that are quoted. It is the number of alternatives from which the buyer can choose. May I give you an example. From the testimony, I think it was Mr. Vincent who suggested that when he produced the Jim Nabors Show, he offered the package to CBS at a price and, as he said, they bought the price. Apparently offered them a single price and they accepted it. I regard that as a transaction, nevertheless, that had price competition because CBS had alternative programs they could choose from and alternatives to which they could turn." (Tr. 4385)

The view that price competition can exist even when only one price is actually quoted was supported also by econo-

mist Robert Nathan (and, apparently, CBS' Counsel, who was questioning him):

> "Q You know, *my idea of competition*, and correct me if I am wrong, is that if I am a buyer, there are people out there perhaps bidding for my product* or I know that the price being offered to me by seller *A may be influenced by his recognition of prices that may be offered by sellers B, C and D, even though sellers B, C and D are not actually bidding* under those circumstances.
>
> *"Is that,* in layman's terms, *an accurate description of competition, price competition?*
>
> "A Under the conditions you described, *it is.* • • •" (Tr. 3982; emphasis added.)

Further, even though CBS economist Franklin Fisher initially stated the opinion that price competition did not exist in the present market because prices are not actually quoted for direct licenses (Tr. 1652), he later admitted that a buyer need not actually go shopping for additional prices for there to be price competition:

> "• • • the fact that he is *able* to shop around and to go for lower prices provides an inducement for price competition on the part of the seller." (Tr. 1670; emphasis added.)

Thus each of the economists who testified at trial agreed that if alternative sources exist, those sources need not actually quote prices for price competition to exist. In the present market, price competition exists. It exists because there are available means other than blanket licenses for purchasing the rights to perform music (Steiner Tr. 4390-91).

The evidence presented in this case, far from suggesting the existence of an agreement among writers and publishers not to compete on a price basis, overwhelmingly demonstrates that writers and publishers would grant licenses directly to CTN if CTN asked for them—that indeed, if

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* This word was reported as "costume", and changed to "product" by stipulation. Obviously the word used by the questioner must have been "custom".

CTN announced its conversion to direct licensing, writers and publishers would "line up" at CTN's window (Steiner Tr. 4396), and would converge on CTN and its producers in a "mad rush" or a "wild scramble", with "a deluge of price cutting bordering on the cutthroat nature." (Brettler Dep. 295, 300, 303)

Therefore CBS' price fixing claim fails both in theory and in fact.

3. There Is No Tie-In.

CBS makes two attempts to shape this case to fit into the tie-in pigeonhole. It claims that "accessible" music is tied to "inaccessible" music, and that "unwanted" music is tied to "wanted" music. For a number of reasons this case simply will not fit into the pigeonhole.

(a) There is no tying of "accessible" to "inaccessible" music.

The Supreme Court has defined a tying arrangement as

> "• • • an agreement by a party to sell *one product* but only on the condition that the buyer also purchases *a different (or tied)* product • • •." *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958) (Emphasis added.)

A tying arrangement, therefore, must involve two separate and distinct products. This requirement is the major stumbling block to CBS' "accessible"/"inaccessible" tie-in claim.

CBS has claimed that "accessible" and "inaccessible" are two categories of music which are tied together. But it has never, despite pointed prodding, been able to identify which compositions are in which category.

CBS does not claim that there is any evidence that these categories exist, but instead relies on a pretrial stipulation between itself and ASCAP which states as follows:

> "There is a portion of the performance rights to ASCAP music appearing on CTN programs as to which it would be relatively easy for CTN or producers of CTN programs to negotiate for licenses directly with the owners of the performance rights

> to said music. There is a portion of the performance rights to ASCAP music appearing on CTN programs as to which it would be impracticable for CTN or such producers to negotiate for licenses directly with the owners of the performance rights of said music [Without limiting the parties' rights to adduce and offer additional proof with respect to any subject, both parties specifically reserve the right to adduce and offer proof regarding the reasons for such impracticability.] (CX2, ¶ 13; bracketed portion in original.)

There was no evidence at trial which showed any reason for any supposed "inaccessibility" of music to CTN or its producers except the testimony as to spontaneous and short-notice uses, and testimony as to the short production schedules of the producers of CTN musical variety programs.

Certainly there was no evidence of any mechanical sort of inaccessibility in terms of making contact with the writers or publishers of any music used on CTN programs (see pp. 33-40 above). Instead it was established that as to the music specially created for the program "there is no reason in the world" why the producer cannot obtain performance rights (Statement of CBS Counsel, Transcript July 10, 1970, p. 50); and as to other music, the channels of communication are already open (Sipes Tr. 199-201).

The only reason proffered as to why any music would be "inaccessible" is that there are sometimes very short-notice uses or spontaneous uses of music (*e.g.*, Sipes Tr. 55-57, 256-60), and because variety show producers work on short production schedules, and want to obtain clearances for the music they have selected within two days (*e.g.*, Wright Tr. 408-11, 466-71; Vincent 584-87, 634-35, 642-44). Vincent said he was afraid that if he attempted to get performance licenses directly he could not do so within his time schedule. He said, "time is of the essence" (Tr. 642), and, "We have to have answers then. We have to have prices then, because time is the one thing that works against us constantly." (Tr. 635)

The producers with these intense time problems are the variety producers. The producer of a movie, for example, does have time to obtain performance rights to the songs used in his movie (see, *e.g.*, Mingle Tr. 852-53, 889-90)—and if the same song is used both in the movie and in the variety program it is both accessible and inaccessible. Indeed, CBS' counsel has conceded that "* * * a particular song might be accessible at one point in time and inaccessible in another point of time * * *." (Transcript July 10, 1970, pp. 59-60)

This is why CBS has never identified which are the accessible compositions and which are the inaccessible compositions. Nor will it ever be possible to place compositions definitively into either category so long as CBS does business the way it does, because the concepts of accessibility/inaccessibility—which are labels though up by CBS' counsel rather than any industry characterization of music (Transcript, July 10, 1970, p. 52)—are attributes of the way in which CTN program producers produce their programs,* rather than characteristics of the music or of the copyright proprietors.

Since any given piece of music can be both inaccessible and accessible, and thus be *both* the tying *and* the tied product, CBS' tying claim must fail.

(b) There is no tying of "unwanted" to "wanted" music.

Just as CBS has failed to identify which compositions are accessible and which inaccessible, so it has failed to identify which compositions are "wanted" and which are "unwanted". CTN has not made any selection of "wanted" compositions, and its vice president testified that to do so CBS might have to hire outside consultants (Sipes Tr. 49, 166-67).

CBS has suggested at various times that the "wanted" compositions would consist of those in the ASCAP per-

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* What CBS is really saying is that there are some *programs* for which direct licensing would be feasible and some *programs* where it would not. But it is clear that BMI and ASCAP do not "tie" licenses for one program to licenses for another; each offers per program licenses.

formed works index (*e.g.*, Brief Opposing Summary Judgment, August 16, 1971, p. 41). As a practical matter, however, the performed works index *is* the repertory. As Herman Finkelstein put it in his trial testimony, there are hundreds of thousands of works in the ASCAP repertory which are only "a publisher's dream or a writer's dream":

> "You forget about those works. The works that really constitute the * * * repertory for practical purposes are the works that have been performed." (Tr. 3659)

Leon Brettler expressed the point in more colorful terms:

> "Mr. Hruska if I had a song that wasn't in the ASCAP index of performed work and I went to you as a broadcaster and asked you to use my flops, my dogs, the things that have never seen the light of day, would you seriously enter into conversation with me or throw me out of the office as a time waster, it is the performed works, the works that the public have accepted and given value to that we are really talking about in terms of licensing and payment for and so forth.
>
> * * *
>
> "* * * I don't think that in any serious negotiation anybody is talking about works that have no significance to anybody except the writer who is still hoping that some day the song will become recorded, performed and become of value. * * *" (Dep. 411, 412)

Thus, a request for a license on compositions in the performed works index should be regarded as a request for the entire repertory, cast in other terms only for the purpose of dressing up an antitrust claim.

Moreover it is clear that CBS wants the rights to use more than just the works in the performed works index. The time required to survey and computer-process performances is such that a composition does not become a part of the performed works index until 6 or 8 months after the composition is performed on a surveyed station

or network (Marks Tr. 2561; see Brettler Dep. 413-14). CTN variety programs at present sometimes use newly created compositions (*e.g.*, Vincent Tr. 624-25); apparently, CBS would find this kind of delay unsatisfactory. CBS witness Robert Wright, who is on the staff of the Carol Burnett show, testified on cross-examination that it would "certainly" seriously interfere with his creative opportunities if he had to wait at least six months to broadcast or tape a song from a new Broadway show (Tr. 486).

Indeed, CBS has tried to hedge its bets completely as to whether there are *any* unwanted compositions *at all*. In describing the elements of the per use license on the first day of trial in this case, a description upon which hypothetical questions to the various witnesses were based, CBS counsel stated:

> "Each license *could cover a portion* of the ASCAP and BMI pools which had been designated by CBS, *or it could cover the entire pools*, and that would be dependent upon whether or not the administrative fee would be less, in the event that the license covered only part of the pools.
>
> "* * * In other words, it will be our position on this point, your Honor, at the relief stage of the case, that there ought to be a relationship between the administrative fee and the corpus of the license, the scope of the license. But that is a detail for relief." (Tr. 43; emphasis added.)

If the question whether CBS will really want a license on the entire repertories or only on selected portions is merely a "detail for relief," the failure to offer a license covering a portion can hardly be a predicate for liability*. A cus-

* If the sole circumstance under which CBS would be interested in eliminating some compositions from its license were that the administrative fee would be lower, then it is clear that CBS does not want a limited license. ASCAP and BMI have ready and waiting complete repertories. Under existing forms of licenses, all that is required in checking whether a song is licensed is a determination that it is in the repertory. If the licensing organizations were required to administer licenses covering only selected portions of the repertories, it is obvious that additional expense would be incurred

tomer cannot show an antitrust violation by charging a seller with failing to offer something the customer does not seriously want to buy. See, *e.g.*, *American Manufacturers Mutual Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 466 F.2d 1131, 1133 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

In any event, even if CBS could specify which compositions fall into the "wanted" category and which into the "unwanted" category, its tying claim would still fail because it has not shown that BMI and ASCAP have the requisite power over the "wanted" compositions. *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5-7 (1958).

In *Northern Pacific* the Supreme Court pointed out that where the tying product is available separately, either from the seller of the package or from someone else, the requisite power over the tying product does not exist and thus there is no unlawful tie-in (356 U.S. at 6-7). It follows that where items are available separately, a party offering to sell a package of such items is not obligated to offer a different package just because a particular buyer desires it.

In the present case, CBS can obtain performance rights to any "wanted" composition directly from the copyright owner (Ex. 10 to CX2; BX114; CX3). The evidence shows that BMI and ASCAP writers and publishers are able to and would grant performance rights directly to CTN (see pp. 40-100). Thus BMI and ASCAP do not in fact have power over the so-called tying product because the tying product is available elsewhere.*

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in introducing into the system information as to the identity of the particular compositions chosen to be part of the license, and thereafter in the ordinary course of business checking which compositions were licensed. To suggest that CBS should pay less for a license covering only a part of the repertory is like saying that a buyer should pay less for corn delivered without the husks. It simply could not be cheaper to administer a license of selected portions of the repertory.

* In addition, the Supreme Court in *Northern Pacific* pointed out that the evil in tying arrangements is that they foreclose competition in the tied product: "They deny competitors free access to the market for the tied product * * *." (356 U.S. at 6) In the absence of proof that competition in the tied product was affected, a tying claim must be dismissed. *Coniglio* v. *Highwood Services, Inc.*, Civil No. 73-2442 (2d Cir., April 17, 1974). (*Footnote continued on next page.*)

4. CBS' Cases Are Not Apposite.

CBS cites cases in support of several astounding propositions. First, CBS says that it is irrelevant that CBS can purchase performance rights other than by taking a blanket license because what it calls "by-pass defenses" "have been rejected as a matter of law." (Brief, p. 20) Second, CBS makes the inconsistent but no less extraordinary claim that the burden of proving that CBS can purchase performance rights in other ways is on the defendants and that there is a presumption against the existence of those alternatives (Brief, pp. 27-28, 31-34). Indeed, CBS claims no less than that writers and publishers have the burden of proving that they would not engage in a concerted refusal to deal if and when CBS chose to approach them for direct licenses! In other words, CBS would have this court hold that the defendants are presumed guilty until proven innocent.

CBS' propositions are in obvious conflict with the elementary principle that the plaintiff in a Sherman Act case must establish an unreasonable restraint of trade. See, *e.g.*, *Denver Petroleum Corporation* v. *Shell Oil Company*, 306 F. Supp. 289, 300 (D. Colo. 1969); *Independent Taxicab Operators' Association* v. *Yellow Cab Company*, 287 F. Supp. 979, 983 (N. D. Cal. 1968); *Kinnear-Weed Corp.* v. *Humble Oil & Refining Company*, 150 F. Supp. 143, 160 (E. D. Tex. 1956). What CBS has done is to confuse two separate elements of an antitrust case. The plaintiff in a private antitrust action must establish (1) an unreasonable restraint of trade and (2) injury or threat of injury, depending on whether the suit includes a demand for damages or seeks injunctive relief alone. CBS has cited cases in which the plaintiff had sufficiently pleaded or established the first element, and the court was discussing what standards of pleading or proof applied to the second element.

(*Continued from previous page.*)

CBS has not sustained its burden on this issue. Nor could it, for CBS describes the "unwanted" as "compositions which [it] cannot possibly use and has no desire to license" (Post-Trial Brief p. 58). To show foreclosure of competition in the market for the tied product CBS would have to claim that but for BMI's and ASCAP's power over the "wanted" compositions, CBS would have obtained the "unwanted" compositions directly from the copyright owners.

CBS has taken those statements regarding the element of injury or threat of injury and has sought to apply them to the element of restraint.

The CBS cases are essentially refusal to deal cases.* In each of these cases, the plaintiff had either established or pleaded that he had actually been denied something—a Motorola distributorship, access to telephone poles, space in a produce market, a gasoline station lease, and so on. The question before the courts was whether the plaintiff had to prove the non-existence of alternatives in order to establish threat of injury or injury. CBS seeks to apply statements as to this question to the issue of the refusal to deal itself. However, in none of the cases is there the slightest suggestion that the plaintiff did not have the burden of proving refusal to deal.

The confusion which has befallen CBS is aided by the peculiar nature of its antitrust claim. CBS does not make the traditional claim that it has been the victim of a concerted refusal to deal. Rather, CBS says that it would be the victim of a concerted refusal to deal if it tried to deal directly. Talk of what might or would happen under hypo-

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* An exception is *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), *aff'g* 287 F. Supp. 143 (D. Md. 1968), *cert. denied*, 397 U.S. 920 (1970), a tying case. CBS misstated what the trial court found, which led it to misconstrue language in the opinion of the Court of Appeals. Advance, a Baltimore firm engaged in selling paper for electro-static copying machines, complained that it was foreclosed from selling paper to rental customers of SCM's Model 55 copier because SCM tied rental of the machine to use of SCM paper. Judgment was entered for Advance in spite of SCM's claim that it also offered the Model 55 for sale to leasing companies which could lease the machine to users without a paper tie-in. CBS states that the District Court found that "SCM alternatively offered its machines through independent leasing companies *which would render the required services irrespective of the paper used.*" (Brief, p. 33; emphasis added.) On the basis of this reading, CBS construes language in the opinion of the appellate court as holding that there is a "presumption" against alternatives. In fact, what the District Court found was that SCM had not sold any Model 55 machines to leasing companies (287 F. Supp. at 152 n. 17). A user desiring to rent or lease the Model 55 thus had no choice but to deal with SCM and accept the tie-in. Viewed from the perspective of this finding, the appellate court's statements do no more than reiterate the holding below that the proffered alternative did not exist in fact.

thetical circumstances is not unusual when the issue under consideration is threat of injury. In this case, however, it must be kept in mind that what CBS says would occur under hypothetical circumstances is the restraint itself. As plaintiff, the burden remains on CBS throughout to establish this basic element.

C. CBS' Failure To Pursue Alternatives Does Not Prove That The Alternatives Do Not Exist.

CBS seeks to have this Court infer that no alternatives to a blanket license were in fact available to CBS from the very fact that CBS apparently had not pursued any of the alternatives apparently available. Persistent refrains in CBS' presentation have been that CBS need not have pursued an unsatisfactory alternative, and that since it did not pursue direct licensing, that must not be a realistic alternative. The premise underlying this argument is the proposition that CBS must be regarded as the judge of its own best interests (*e.g.*, Fisher Tr. 4783, 4803-04).

This, of course, is a bootstrap argument. The relevant question is what *is* the fact, and not what did CBS believe to be the fact. The issue is whether realistic alternatives *exist*, not whether CBS believed them to exist. If a plaintiff could establish a fact merely by asserting his belief as to the fact, a litigation would be concluded with the filing of a complaint.

Moreover, CBS' bootstrap argument proceeds from a demonstrably false premise—the premise that the decision not to pursue alternatives was made by a rational model of economic man, an omnisicent CBS. In reality, of course, like all decisions, CBS' decision was made by human beings variously flawed as regards information, intelligence, emotion and energy. But whenever defendants have inquired into the circumstances under which CBS made its decision to try for a per use system, CBS has characterized the inquiry as relating to the "motives" for the suit and therefore "irrelevant" (*e.g.*, Tr. 4486).

When the circumstances under which CBS made its decision are examined, it becomes quite clear that CBS' consideration of alternatives to the blanket license is of no probative value whatever as to whether the alternatives are realistic. CBS' decision was made by persons who were ignorant of nearly all relevant facts and who made only the most superficial examination of alternatives.

1. The Impetus for CBS' Decision.

To place CBS' exploration of alternatives to the blanket license in perspective, the relationships between the parties prior to 1970 must be considered, for it is no coincidence that this lawsuit was commenced just hours before BMI's termination of CBS' license for the television network became effective (Paley Dep. 118-19; BX 166).

For many years prior to 1969, CBS had held a blanket license from BMI (Cramer Tr. 4268). Since 1954, the blanket license fee had remained unchanged at 1.09% of net receipts from sponsors after deductions (Cramer Tr. 4268-69). On a number of occasions the license was renewed for specified periods of years; then, in 1965, the parties agreed to extend the license indefinitely, subject to termination on 60 days' notice (BX 166; Cramer Tr. 4274).

The termination which prompted this suit came about because of a breakdown in negotiations between CBS and BMI concerning a blanket license. In April, 1969, CBS and ASCAP submitted for court approval agreements providing for final license fees for 1969 and a number of prior years. The payments called for by these agreements had the effect of sharply widening the historical ratio between ASCAP and BMI fees from CBS despite the fact that during the years in question the gap in usage had been narrowed (Cramer Tr. 4258-60).

BMI President Edward Cramer sought out CBS to negotiate for an adjustment in payments by CBS for the past and for higher blanket license fees for BMI for the future (Cramer Tr. 4260-67). A number of meetings

were held between Sipes and Cramer; at these meetings, it was Cramer who was complaining, not Sipes (Sipes Tr. 324-325). After Cramer's numerous attempts to negotiate for higher fees proved fruitless, BMI gave notice on October 29, 1969 that it was exercising its right to terminate the network license and that the termination would become effective January 1, 1970 (Cramer Tr. 4273-74; BX 166).

Thus, when CBS' first request* for a per use license was sent on December 19, 1969 (PX 200), more than a month and a half had elapsed since BMI's notice of termination was sent and less than two weeks remained before termina-

* At his deposition more than three years after this action was commenced and again at trial, Sipes claimed that he had orally requested a per use license from BMI prior to the CBS letter of December 19, 1969 (Tr. 36-37). At trial Cramer vigorously denied this (Tr. 4271-73, 4292-93). Circumstances indicate that Sipes' claim is false:

1. On March 4, 1970 BMI propounded a single interrogatory to CBS asking in substance whether CBS had made any request to BMI for a per use license prior to the CBS letter of December 19, 1969. CBS' answer to the interrogatory, verified by John Appel on April 14, 1970, showed that it had not (BX 169). Surely CBS' counsel could not have attempted to answer this interrogatory without interviewing Sipes. To this day, CBS has not amended this answer.

2. On May 28, 1970, Cramer submitted an affidavit in support of BMI's motion for a preliminary injunction which stated that

"At none of the meetings betweten BMI and CBS in 1969 * * * did CBS indicate in any way that it desired a music license in which payments would be made for each individual use of music. The first indication of any such desire was given by the CBS letter dated December 19, 1969 * * *." (¶ 21)

Although Sipes submitted a detailed affidavit in response which discussed the circumstances leading up to the December 19 letter, he nowhere mentioned any pre-December 19 request (Sipes Aff. July 7, 1970 ¶ 29).

3. On cross examination at trial, Sipes could not recall when he made the request to Cramer; could not recall whether anyone else was present; could not recall discussing the question with anyone at CBS prior to making the request; could not recall reporting to anyone at CBS, either in the normal course of reporting or in preparation for the December 19 letter, that he had made the request; could not recall when was the first time he ever mentioned the request to anyone; and could not recall whether he had ever mentioned it to anyone prior to the date of his deposition (Tr. 371-77).

tion would become effective. These, then, were the circumstances under which CBS was called upon to consider alternatives to a blanket license.

2. The "Consideration" Given to the Alternatives

When Sipes, himself no expert on music or other forms of music licensing (*e.g.*, Tr. 371, Dep. 88), considered alternatives to blanket licenses, he talked to only three people. They were Robert Evans, John Appel and Emil "Duke" Poklitar (Tr. 156). Evans and Appel are lawyers—Evans is general counsel of CBS and Appel is his deputy (Tr. 156; Evans Dep. 3-4, 6-7); they talked to Sipes only in their capacity as legal counsel, and Sipes neither sought nor received their advice on business aspects of licensing (Evans Dep. 19-21; see 38-39).

The only person whose business advice Sipes sought was Poklitar, the CBS employee who is in charge of the staff of clerical personnel who process music logs and cue sheets submitted by program producers (Poklitar Dep. 9-12, 118, 156). Yet, according to CBS' counsel, Poklitar, who has no formal buiness training (Dep. 4), is "not a businessman" and his judgments on business aspects of music licensing are not relevant (Poklitar Dep. 117-18; Tr. 4677-78).

Despite their collective lack of expertise, Sipes and his colleagues made no effort to expand their knowledge. Nobody talked to any writers or publishers about any alternatives to the blanket license (Tr. 151, 204, 358; Evans Dep. 28-29; Poklitar Dep. 78). Nor, prior to commencing this action, did they speak to any television producers, on whom they proposed to place the burden of acquiring performance rights (Tr. 309-10; Poklitar Dep. 74, Evans Dep. 28-29). Nor did they consult any experts in music licensing (Tr. 311). Nor did they discuss any alternative methods of licensing with ASCAP or BMI prior to the demand letters sent a few days prior to the commencement of this lawsuit (Tr. 180, 369, 4271-73).

Despite not being familiar with per program licenses (Sipes Tr. 371), they never asked either BMI or ASCAP

to quote terms for such a license, but merely speculated (Sipes Tr. 180, 255-56, 369; Cramer Tr. 4271; Hruska Tr. 1711-12). They speculated as to the attitudes of copyright owners to direct licensing (*e.g.*, Sipes Tr. 151, 204; Poklitar Dep. 77-78). And consideration of both the per program and direct licensing alternatives appears to have proceeded with considerable ignorance of the nature and sources of music used on the network and the contractual rights already existing with respect to that music (*e.g.*, Sipes Tr. 213, 246, 260, 320, 360-61; Poklitar Dep. 54-55).

Finally, CBS, perhaps the largest music user in the world (Dann. Tr. 3421), made no use of the considerable music industry expertise possessed by its other divisions. Such entities as CBS Records, the largest record company in the world, and April Music and Blackwood Music, two of the largest music publishing companies, have a great deal of knowledge of the music publishing industry, the means employed by producers to acquire music, and the nature of the music needs of network television (PX94; PX484; Tr. 1824-26, 2565, 4615-16). But, as Sipes said of April, "I never talked to those people. I don't even know them." (Tr. 211)

Thus, it comes as no surprise to learn that no one at CBS ever put pencil to paper to figure out the cost of a per program license, or the cost of direct licensing, or the cost of a per use license (Tr. 157-58). No one at CBS did a study of whether the per use proposal was even feasible (Tr. 156). Sipes testified that he does not know how compositions would be added to or deleted from the per use license reservoir, he does not know how the right to withdraw would operate, he does not know the administrative costs to CBS of a per use approach, and he does not know whether CBS could do without songs for the six months from first performance required to get the song in the ASCAP performed works index (Tr. 152-53, 168-69, 281). He suggests that the BMI payout system would be an appropriate standard for setting per use rates, but knows nothing about the BMI payout system (Tr. 223, 339). In

fact, Sipes does not know of his own knowledge whether a per-use license would be feasible (Tr. 158-60). Yet Sipes said that no one at CBS knows more about the per-use system than he does* (Tr. 151).

This, then, is the picture of a company which claims to have been the best judge of its own interests. Fundamentally, what happened here was that a small group of CBS employees, consisting mostly of lawyers, was confronted with a business problem for which CBS had failed to make adequate preparation; lacking the time or the inclination to develop the resources to confront the business problem on a business basis, lawyers sought a legal solution.

BMI does not urge that this history would be sufficient to deny relief to CBS if it had an otherwise meritorious case; rather, it is offered only to show that CBS' failure to pursue alternatives is attributable to inadequacies in CBS' management rather than to anything in the nature of the alternatives themselves.

D. "Competitive Disadvantage": A Theory Dehors Reality

CBS post-trial papers have greatly emphasized the notion of "competitive disadvantage". CBS does not, however, claim to have *proven* that it would have suffered "competitive disadvantage" if it had attempted to obtain performance licenses, wholly or partially, directly from copyright owners. Rather it claims that defendants have stipulated to CBS' "competitive disadvantage".

CBS arrives at this position by interpreting a part of a stipulation between itself and ASCAP** while ignoring an

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* Sipes has recently left CBS to become a vice president of a talent agency in Los Angeles (see Variety, April 3, 1974), so that even this modest store of expertise is gone.

** BMI was not a party to the stipulation and has never agreed to be bound by CBS' stipulations with ASCAP. Thus CBS' statement that "At no time has BMI ever sought to be relieved of" this stipulation (Plaintiff's Findings p. 33) is misleading. BMI entered into only one stipulation of fact with CBS. The BMI-CBS stipulation, entered into some seven months prior to the CBS-ASCAP stipula-

integral part of the paragraph it relies on. On May 25, 1972, CBS and ASCAP entered into a stipulation which stated in part as follows:

> "• • • There is a portion of the performance rights to ASCAP music appearing on CTN programs as to which it would be impracticable for CTN or such producers to negotiate for licenses directly with the owners of the performance rights of said music. [Without limiting the parties' rights to adduce and offer additional proof with respect to any subject, both parties specifically reserve the right to adduce and offer proof regarding the reasons for such impracticability.]" (CX2, ¶13; bracketed portion in original.)
>
> "*If CTN chose not to have an ASCAP license,* the producers of CTN programs did not obtain such licenses, and NBC-TN and ABC-TN had such licenses, to the extent that CTN or the producers of CTN programs did not otherwise obtain the performance rights to the ASCAP music which they desired to use on CTN programming, CTN would be at a competitive disadvantage vis-a-vis NBC-TN and ABC-TN." (*Id.* ¶15; emphasis added.)

CBS says that this constitutes a stipulation that CTN would suffer competitive disadvantage to the extent that it and its program producers were unable to fill their music requirements on a direct licensing basis (Plaintiff's Findings p. 29). To reach this interpretation CBS has obviously ignored the portion of paragraph 15 of the stipulation italicized above, which is the very first premise of the paragraph. The plain meaning of the stipulation is that if (1) CTN, alone of all the networks, chooses not to take *any* ASCAP license, and if (2) it or its producers cannot obtain the music they need from copyright owners, there would be competitive disadvantage.

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tion (CX3), provided that with respect to the practicability of CBS' obtaining direct licenses from BMI writers and publishers, both parties would be bound by this court's determination with respect to the practicability of CBS' obtaining direct licenses from ASCAP writers and publishers.

The music uses on CTN programs for which direct licenses obviously could not be obtained are spontaneous or ad-libbed performances; since these performances are not anticipated, direct licenses could not be obtained in advance. As Sipes said,

> "• • • it is already done with no chance—positing spontaneous because there was no chance to set it up front or to stop it up front. • • •" (Tr. 278)

For these uses CBS cannot do without a BMI or ASCAP license of some kind.

Thus CBS' demand for a per-use license would deny the right of withdrawal to copyright owners for CTN's spontaneous performances and other unanticipated uses (PX881, ¶ 8; Sipes Tr. 278). And even though CBS purports to demand, "alternatively", that BMI and ASCAP be *enjoined* from licensing any television network, it still demands BMI and ASCAP licenses for unanticipated uses (see, *e.g.*, Post-Trial Brief p. 2).

In addition to ignoring the first premise of paragraph 15 of the stipulation, CBS has attributed to paragraph 13 a quantification which is not there. At page 56 of its Post-Trial Brief CBS states that "a substantial quantity" of music used on CTN would not be obtainable through direct licenses, and that the CBS-ASCAP stipulation "states as much".* Far from "as much" as stating that "a substantial quantity" of CTN music is unobtainable directly, paragraph 13 of the CBS-ASCAP stipulation simply states "there is a portion • • •", without making any pretense of quantification.

CBS' reason for wanting to make it appear that the defendants have stipulated that "a substantial quantity" of music is not obtainable directly is obvious: because the evidence reveals that very little CTN music is not obtainable directly.

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* Again CBS claims that this stipulation applies to BMI, which it does not. BMI has never agreed to be bound by CBS' stipulations with ASCAP, but only by specific judicial determinations.

CBS called Poklitar to testify as to the extent of spontaneous music use. Unfortunately, Poklitar had not calculated precise figures even though he had the documents from which this could be done. However, even using Poklitar's largest estimates, it appears that not more than 3 to 4 percent of CTN's programs annually contain spontaneous performances of music; doubtless, the figure for programs containing spontaneous performances of music in the repertory of a particular performing rights organization would be much lower (Tr. 2046-60).

The only other programs on which CBS could conceivably have difficulty in obtaining direct licenses are the handful of shows making heavy use of previously published music, principally the variety shows. No significant competitive disadvantage could result from limited musical selection with respect to these shows since variety programming on all of the networks is very, very limited, and since CBS witnesses made it quite clear that whatever the creative needs of a variety show, there are always a number of compositions that fit any program idea (*e.g.*, Wright Tr. 419; Vincent Tr. 586).

Thus, when the former CTN head of programming was asked on cross examination by CBS' counsel whether the inability to license some music directly would put CTN at a competitive disadvantage, he said he could think of nothing CTN could live with more easily:

> "Q • • • assume, Mr. Dann, that • • • the producers of CTN programs are unable to use a substantial amount of the ASCAP and BMI music which they want to use on their programs. • • •
>
> • • •
>
> "In those circumstances would that inability destroy the competitiveness of a large number of CTN programs, thereby threatening the network's continuing existence?
>
> • • •
>
> "A I do not believe that the role of music is such in network broadcasting that any appreciable loss of

certain kinds of music could threaten its existence, any more than a loss of a star in a program. The program goes on, it would replace it.

"* * * none of it would be so catastrophic as to threaten CBS or any other network's chances of survival.

"Q Would it threaten the competitive effectiveness of CTN's programs?

"A * * * we have only two hour variety shows on the air * * *—I don't think The Carol Burnett Show or the Sonny & Cher show, because they are essentially comedy shows, would be at all threatened for survival or even change in rating one point because of their limited music selection.

"Q The question was not limited, sir, to the Carol Burnett and Sonny & Cher programs. I am asking you to assume in the question that a substantial amount of the music that the producers of CTN programs of whatever nature want to use is unavailable to those producers. Would that destroy the competitive effectiveness of CTN programs?

* * *

"A * * * the variety shows represent the maximum use of music, and if they aren't relevant, sir, to survival in a competitive picture in the music forms, I suggest to you that in the film forms, which make up the huge percentage of competitive programming, it would be less so.

"So I repeat, I do not think that it would be a factor in CBS's chance to be highly competitive in the market place. * * *" (Tr. 3310-13)

"Q Mr. Dann, how long do you think the CBS television network could hold out if a substantial number of the major publishers and major writers in this country refused to deal with CTN, other than through ASCAP and CTN cancelled its ASCAP license?

"A Under the present programming schedule of CBS, *I can think of nothing I could live with easier* as a program bureaucrat than losing this for the moment, these rights for the moment. I mean if we cancelled them. It would not be a disruptive influence because we would—there is only two variety shows on the network and I know I could live with one season or two seasons with it. * * *" (Tr. 3373-74; emphasis added.)

II.

CBS HAS NOT SHOWN MONOPOLIZATION OF ANY RELEVANT MARKET.

As the Supreme Court said in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966),

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

The plaintiff in a Section 2 case, then, is required to prove as one of the elements of its claim the relevant market. CBS' Section 2 claim fails because it depends entirely on a casuistic definition of the relevant market.

A. The Relevant Market Is The Market For Public Performance Rights To Music Wanted For Network Television, Not The "Market For A BMI Blanket License".

CBS would have this Court rule that there are two relevant markets involved in this action: one a market for a BMI blanket license, and the other a market for an ASCAP blanket license (Fisher Tr. 1748-49, 4818-19). The absurdity of such a market definition can easily be seen from an examination of exactly what it is that CBS has obtained from BMI, ASCAP and SESAC, what it is that CBS must have to broadcast its network programs, what it is that CBS expects the producers of its programs to obtain, and what it is that CBS claims copyright owners are not competing to provide.

"What it is" is the right to perform publicly for profit musical compositions wanted for use on network television. CTN can obtain public performance rights in a number of

ways—but the *way* in which it obtains the rights should not be confused with the rights themselves.

Proof that the relevant market is the rights themselves, rather than one of the ways in which the rights may be obtained, is the fact that CBS claims that it does not want a blanket license for its television network. Clearly a "market" whose sole product the plaintiff says it does not want cannot be a "relevant" market, and the monopolization of a market the plaintiff desires to avoid cannot injure the plaintiff.

The commodities which this case actually involves are public performance rights to copyrighted music desired for use on network television.* These are the rights that CBS

* Actually, CBS' proof supports a much broader market definition even more destructive of its Section 2 claim. CBS has maintained that because licenses for public performance rights are obtained for CTN programs by CBS rather than by program producers, producers are not fully able to make "trade-offs"—*i.e.*, choose freely which program elements to spend their budget dollars on. Thus, Messrs. Wright, Vincent and Sunga all testified that they would like to have the acquisition of music performance rights under their control so that they could determine whether to spend less of their budgets on music rights and more on costumes, scenery, dancers, props, and so forth. (Wright Tr. 453-59; Vincent Tr. 602, 617, 672; Sunga Tr. 751). And Professor Fisher theorized that the relief proposed by CBS in this case would allow music to compete with other "program inputs" (Tr. 1665-67). CBS summarizes its "trade-off" claim in its proposed findings as follows: "all program elements compete for budgeted production dollars; all that is, except music performance rights * * *" (Plaintiff's Finding 29 (b)); therefore "* * * the present system injures * * * the suppliers of other program elements * * *" (Plaintiff's Finding 30).

The argument that program producers are foreclosed from determining whether to spend a given budget dollar on non-musical creative elements of the program suggests that the relevant market in this action is not limited to music rights but is instead the market for creative elements of network television programs.

Of course, CBS has offered no proof as to the size of this larger market or as to defendants' share of it; indeed, the testimony was that music is "a small part of the total budget" (Dann Tr. 3300). Although the cost to CBS of an hour of programming can range from $200,000 to $700,000 (Dann Tr. 3272, 3292; Silverman Tr. 4757; PX862), the total cost per program of blanket licenses from ASCAP and BMI is less than $800 (see pp. 2-3 above). Hence, CBS has no claim of monopolization in this larger market. As

needs in order to furnish programs to affiliated stations; these are the rights that CBS proposes to have CTN program producers secure; these are the rights that CBS purports to want to get for CTN on a use-by-use basis from copyright proprietors.

There are a variety of ways in which CBS may acquire these public performance rights. A BMI blanket license is merely one form of transaction for the acquisition of those rights. As economist Peter Steiner testified, CBS' definition of the market as the market for a BMI blanket license

> "• • • confuses a transaction in the market with the market itself. I think the market is the market for music performance rights and I think that a particular license is a transaction in that market." (Tr. 4386)

CBS' notion that the relevant market in this case is the market for a BMI blanket license flies in the face of the definition of a relevant market under the Sherman Act. In *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), the Supreme Court defined the relevant market for Section 2 purposes as being "composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *Id.* at 404. The Court clarified the nature of "interchangeability" by stating that:

> "Nor is it a proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market.
>
> • • •
>
> "• • • where there are market alternatives that buyers may readily use for their purposes, illegal

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the Court of Appeals for the Second Circuit said in *Syracuse Broadcasting Corp.* v *Newhouse*, 236 F.2d 522, 525-26 (2d Cir. 1956):

> "Plaintiff's theory is that its radio station competes in the Syracuse area for the same advertising dollar as do defendants' radio station and newspapers, along with the other three radio stations. Thus plaintiff has defined the 'relevant market' in a fashion which destroys its claim of monopoly under Section 2. * * *"

monopoly does not exist merely because the product said to be monopolized differs from others. * * *" (*Id.*, at 394)

The test as to the interchangeability of products is therefore twofold. First, is there "functional" interchangeability —*i.e.*, can the products be used for the same purpose? And second, is there "reactive" interchangeability—*i.e.*, is a purchaser willing to substitute one for the other? *United States* v. *Chas. Pfizer & Co.*, 246 F. Supp. 464, 468 (E.D.N.Y. 1965). Musical compositions meet both of these tests in the present case.

While it is true that each composition is unique in that it is not precisely like any other, it is the fact that in the television network market, compositions possess considerable interchangeability. For each musical need on network television,* a number of compositions will fill the bill. The functional and reactive interchangeability of musical compositions for network television use was illustrated time and again in the testimony of the CBS witnesses.

CTN Vice President Sipes, for example, stated that if for some reason he could not obtain one musical composition he would simply use another (*e.g.*, Tr. 288, 298). Robert Wright testified that his staff would normally develop a theme for part of a television program, and there would be "any number" of "songs that would fit that look" (Tr. 419). Wright said that a guest star will usually bring about three choices of songs with him: "there are always at least a couple—for us to talk about * * *." (Tr. 412) If the guest's selections did not fit well with the planned program, "we will have a couple to propose to him." (*Id.*)

Similarly, Vincent testified that in dealing with guest stars for the musical variety program he helped produce,

*The present market for performance rights on music desired for network television use actually consists of a large number of submarkets for particular music needs—needs for a cowboy song, a gondolier song, a spring song and the like. *Cf. Affiliated Music Enterprises, Inc.* v. *SESAC, Inc.*, 160 F. Supp. 865, 874 (S.D.N.Y. 1958), *aff'd*, 268 F.2d 13 (2d Cir. 1959) (the demand "for performance rights in gospel music * * * cannot be satisfied by substituting performance rights in other popular music.")

> "• • • We would negotiate and we would come up with a song, two songs, three songs. *There would always be, obviously, alternates to what we had thought about.*" (Tr. 586; emphasis added.)

Thus, when the producing staffs decide what direction a program will take, and seek synchronization licenses for their choices of the music to be used, they always have several alternative compositions in mind in case clearance of those rights runs into some obstacle (Wright Tr. 430, 468-69).

One "obstacle" which may occur is that the price of the synchronization right for one song may be more than the producer is willing to pay. In this event, the producer either negotiates a lower price (*e.g.*, Vincent Tr. 606; Sunga Tr. 749-50) or chooses alternative compositions (*e.g.*, Wright Tr. 409, 429-30a; Sunga Tr. 749).

Wright testified that "I would use the lower price song if I have two equally good songs or almost equally good songs that will serve my purpose." He gave as an example his initial selection of "Santa Lucia" to set a Venice scene. However, he discovered that "Santa Lucia", which was "perfect", cost $300, whereas "O Sole Mio" would cost only $50. "So, we, without hesitation, went for 'O Sole Mio'" (Tr. 430).

Similarly, in one scene Vincent had originally wanted to use "Happy Birthday To You" which he described as "a very unique song because its the only one that says exactly that • • •." (Tr. 603) But since "Happy Birthday" would have cost $500, he decided to use "For He's a Jolly Good Fellow" instead (Tr. 604).

Likewise, in the motion picture field, a producer will have in mind a number of alternative songs for use in his picture and will shop for price. When movie producers telephone the Harry Fox Agency to price synchronization and performance rights, they generally ask for quotations on "more [songs] than they can ever use" (Mingle Tr. 868).

CBS' witnesses have thus given clear and convincing evidence that there is a great deal of functional and reactive interchangeability among copyrighted compositions for network television use.

B. BMI Does Not Have Monopoly Power Over Performance Licenses For Musical Compositions Wanted For Network Television Use.

Not only is there a high degree of interchangeability of compositions, but the performance rights to these compositions are also available from more than one source.

Because both the BMI and ASCAP repertories have a full range of compositions of all types, a user can obtain any type of composition from either BMI or ASCAP. And he can get his performance rights through either a blanket license or a per program license from either organization.

More importantly, the user need not use either the BMI or the ASCAP blanket or per program license to get performance rights to any composition he wants; neither BMI nor ASCAP has exclusive control over any of the compositions in its own repertory. Each composition can be licensed from another source: the copyright proprietor himself (CBS-BMI stipulation (CX 3); ASCAP consent decree (Ex. 10 to CX 2); BMI consent decree (BX 114)). This is not even a matter of obtaining substitutes—it is a second source for the identical product, the public performance right to a given musical composition.

Further, given the interchangeability of music for television use—there are "obviously alternates" (Vincent Tr. 586), and "any number" of "songs that would fit" (Wright Tr. 419)—the number of sources for performance rights to a given type of composition is limited only by the program producers' imagination.

In a typical situation, then, the user has the following sources from which to obtain public performance rights for any given type of composition:*

(1) a BMI blanket license;
(2) a BMI per program license;
(3) an ASCAP blanket license;
(4) an ASCAP per program license;
(5) a direct license from any BMI publisher having such a composition in his catalog; and
(6) a direct license from any ASCAP publisher having such a composition in his catalog.

* For some types of music such as gospel, country and foreign the user can also add SESAC to his list of potential licensors.

Since the relevant market in this action is the market for performance rights to music wanted for television network use, and since the television producer has two sources from which to license any specific piece of music, and a large number of sources from which to license interchangeable music, BMI clearly does not have monopoly power in the relevant market.

CBS' claim that BMI has monopolized the market for a BMI blanket license is equivalent to the claim that a seller has monopolized its own sales. In terms of antitrust law this market definition is humbug. A seller sells what it sells —in fact it always sells one hundred per cent of what it sells.

The impetus for CBS' contorted market description is clear from a concession in the CBS Post-Trial Brief. There CBS recognizes "The fact that performance rights to individual compositions may be reasonably interchangeable • • •" (p. 62). And therefore CBS has contrived a market description so that "by definition, each organization" can possess 100% of the market (*Id.* p. 65).

The Sherman Act, however, does not deal in such tautological monopolies*—especially when the plaintiff is complaining that "the defendants are the only sellers of what we do not want to buy."

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*See, for example, the numerous cases rejecting claims that manufacturers have monopolized the sale of their trademarked products. *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 392-93 (1956); *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir. 1957), *rev'g* 135 F. Supp. 4 (D.D.C. 1956), *cert. denied*, 355 U.S. 822 (1957); *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899, 906 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957); *Top-All Varieties, Inc.* v. *Hallmark Cards, Inc.*, 301 F. Supp. 703, 704 (S.D.N.Y. 1969); *Industrial Building Materials, Inc.* v. *Interchemical Corp.*, 278 F. Supp. 938, 957-58, 964 (C.D. Cal. 1967), *rev'd on other grounds*, 437 F.2d 1336 (9th Cir. 1971); *Kemwel Automotive Corp.* v. *Ford Motor Co.*, 1966 Trade Cas. ¶ 71,882, at 83,096 (S.D.N.Y. 1966); *A-1 Business Machine Co.* v. *Underwood Corp.*, 216 F. Supp. 36, 37 (E.D. Pa. 1963); *Johnny Maddox Motor Co.* v. *Ford Motor Co.*, 202 F. Supp. 103, 105-06 (W.D. Tex. 1960); *Nelligan* v. *Ford Motor Co.*, 262 F.2d 556, 557 (4th Cir. 1959), *aff'g* 161 F. Supp. 738, 743 (W.D.S.C. 1958).

Here the plaintiff's claim is even weaker, because the products licensed by ASCAP and BMI are available from other sources—the copyright owners.

III.

CBS' PER-USE LICENSE WOULD BE GROSSLY UNFAIR TO WRITERS AND PUBLISHERS AND WOULD DECREASE COMPETITION.

At present, a television network music user is provided with a range of alternatives entirely sufficient to adapt to its music needs. The per-use system that CBS seeks to impose on writers and publishers of music would seriously diminish competition, and would give CBS the power to coerce copyright owners to grant CTN licenses, the power to confiscate their music, and the power to unilaterally lower the price at which CTN could take their music.

A. The Per-Use License Can Only Decrease Competition Because The Proposed Withdrawal "Right" Is Wholly Illusory.

To evaluate the proposed right of the copyright proprietor to withdraw compositions from the per-use reservoir, several features of the proposed per-use system must be considered. The following description of these features is taken from the version of the per-use system contained in PX881, presented by CBS on May 9, 1974.

> (1) CTN would pay BMI (or ASCAP) a specified fee for each use of BMI (or ASCAP) music covered by the license ("per-use reservoir"), and not licensed directly. In light of the proposed rights of copyright owners to withdraw compositions from the per-use reservoir, CBS suggests that it will not be necessary to provide different prices for comparable uses of different works (see also statement of CBS Counsel, Tr. 565);
>
> (2) CTN and its producers may obtain licenses to compositions remaining in the per-use reservoir directly from the copyright owner;
>
> (3) Each copyright owner would have the right to withdraw any, some or all of his compositions

from the per-use reservoir. This right of withdrawal could be exercised only "on reasonable notice or at periodic intervals (*e.g.*, quarterly).";

(4) The right of withdrawal would not be operative with respect to the use of music taped or filmed prior to the effective date of withdrawal, even though the tape or film be broadcast subsequent to that date;

(5) The right of withdrawal would not be operative with respect to a new composition unless the copyright proprietor had already exercised his right of withdrawal three months prior to its entering the per-use reservoir;

(6) The right of withdrawal would not be operative with respect to spontaneous or other "unplanned" uses of music, even if such uses did not constitute "fair use" under the copyright laws;

(7) The schedule of per-use rates "would be adjusted at periodic intervals to reflect prices arrived at in the market."

The evidence presented at trial has demonstrated that the restrictions on the so-called right of withdrawal, the way in which CBS proposes to use its per-use license, and the very limited circumstances in which CBS will approach copyright owners directly for licenses will compel each copyright owner to compete against himself, not against others, and will deprive copyright owners of the ability to negotiate fair and equitable royalties for the use of their music.

As CBS has structured its per-use scheme the threshold problem confronting the copyright owner will be whether or not to withdraw his composition from the per-use reservoir. The evidence shows that CBS will see to it that the copyright owner remains incapable of making any enlightened decision as to whether or not to withdraw; and no matter what he decides, he will be damned if he does and damned if he doesn't.

1. To Pull, Or Not To Pull.

CTN producers will have instant and effortless access to all compositions remaining in the per-use reservoir. The major worry of the copyright owner contemplating withdrawal of his music from the reservoir, therefore, will be whether withdrawal will disadvantage his works in terms of their potential use on CTN programs. The obvious conclusion is that CTN producers will not go to the trouble of negotiating with respect to a withdrawn composition if there is in the per-use reservoir another composition just as suitable, which can be used without so much as a by-your-leave, and at a lower cost than the withdrawn composition.

Thus in considering whether or not to withdraw a given composition from the per-use reservoir a copyright owner must first explore the substitutability of other compositions for the one in question. Professor Fisher concluded that "the writers of unique music will be the strongest candidates for withdrawal * * *" (Tr. 4778). While, of course, under the copyright laws each copyrighted composition is a unique creation, the "uniqueness" of a composition for use on television will vary substantially from one program to another, from one episode to another, from one program situation to another.

The question of "uniqueness" for television use really breaks down into two components: suitability and interchangeability. The suitability of a given composition depends on program context—the use which the program producer intends to make of it. Interchangeability concerns the question of whether other compositions would also be suitable for the use intended by the producer. Thus, Franklin Fisher stated that uniqueness "depends on the circumstances" (Tr. 4855), and Robert Nathan stated that a writer or publisher could not know whether or not his song is "unique" unless he knows about the show in which its use is contemplated (Tr. 4056).

Thus, neither the question "Is it suitable?" nor the question "Are other compositions interchangeable with it for

this intended use?" are answerable by the copyright owner in the abstract, because *suitability and interchangeability are not characteristics of the composition itself.* These factors are dependent entirely on the program producer's intended use of the composition. Professor Fisher conceded that

> "• • • the question of interchangeability is what it is, so to speak, in the eye of the beholder, in this case the eye of the producer • • •." (Tr. 4819)

It is because suitability and interchangeability are properties of the producer's intended use of the composition rather than of the composition itself that no one at trial could point to any inherently indispensable composition. The closest anyone could come was "Happy Birthday To You," because, says Vincent, "it's the only one that says exactly that • • •." (Tr. 603) Yet Vincent found a substitute for even that often-mentioned (but seldom used) song. He used instead "For He's a Jolly Good Fellow" (Tr. 604). And even if there are few easy substitutes for "Happy Birthday To You," it is clear that it cannot be considered really indispensable: Wright testified that "it's never used" because of its high synchronization price (Tr. 428).

In every instance in which a witness attempted to name an indispensable composition, his statement contained a qualification adverting to a contemplated use which might make the song suitable. For example, Professor Fisher guessed that "Take Me Out to the Ball Game" would be "unique, useful *in situations where* the plot revolves around a baseball game." (Tr. 4854; emphasis added.) Useful in those circumstances, yes; but certainly not without reference to a scene of that type, and hardly indispensable even in the circumstances mentioned. After all, we have all seen baseball game scenes which did not use that song.

Consider also several other examples raised during the trial. "O Sole Mio" would be considered suitable if a producer wanted to present the life of Enrico Caruso, with whom that song was perhaps associated (see Court's com-

ments, Tr. 4058). Yet if the producer instead merely wanted to have a gondolier sing a song to create an Italian ambiance (*e.g.*, Wright Tr. 430), "O Sole Mio" could easily be replaced by another song such as "Santa Lucia". As Wright stated,

> "• • • obviously those two songs are equal. If you want to be Italian, Santa Lucia is as good as O Sole Mio and vice versa." (*Id.*)

"Santa Lucia", however, is not associated with Caruso, and would probably not be considered by the producer as interchangeable with "O Sole Mio" for the Caruso story. "Pagliacci", on the other hand, is a song that is associated with Caruso, and it would probably be considered interchangeable with "O Sole Mio" for the Caruso story, although one would hardly expect to hear it emanating from the lips of a scene-setting gondolier. And, as Vincent stated, you could forget about "Pagliacci" for Johnny Cash "because he is not going to do it." (Tr. 591)

The owner of "Pagliacci", therefore, *if* he knew the various program plans of the CTN producers, could infer that his song had no chance of being selected for Johnny Cash (not being suitable), a poor chance of being selected instead of "O Sole Mio" or "Santa Lucia" for the gondolier (being somewhat suitable but not interchangeable), and a better chance of being selected instead of "O Sole Mio" for the Life of Caruso (being suitable and interchangeable).

These examples emphasize that in order to make an intelligent estimate as to whether a given composition will be (a) suitable for CTN and (b) interchangeable with others, the copyright owner contemplating withdrawal must be able to find out what uses are contemplated for the song by each of CTN's program producers. There will be no way for him to get this information—probably not at all, and certainly not in time to make an effective withdrawal. CBS' one-way notice requirements ensure that.

It was brought out in deposition that CBS has no intention whatever of notifying copyright proprietors of any intended use of music from the per-use reservoir (Poklitar

Dep. 207-08). CBS can be counted on to use its per-use license whenever its bargaining position is weak—*i.e.*, when there are few interchangeable songs for the intended use, and to go directly to the copyright owner when its bargaining position is strong—*i.e.*, when there are many interchangeable songs (see, *e.g.*, Steiner Tr. 4415). Therefore, the copyright owner whose work remains in the reservoir will normally receive no advance notice of any situation in which there are but few substitutes for his composition.

Furthermore, even if a writer or publisher owning music in the per-use reservoir learned through other sources that his composition was to be used on a CTN program, and learned that his composition was considered indispensable to the use planned for that program, the restrictions CBS would have placed on the timing of the copyright proprietor's right to withdraw his composition are such that withdrawal could not be effective. CBS' formal per-use proposal (PX881) requests that the right be exercised only quarterly. Throughout the trial, however, we were told repeatedly that CTN variety programs are produced on strict two-week schedules. Even if the production schedule is as long as six weeks*, a copyright proprietor has no realistic opportunity to withdraw his composition since he must give three months' notice.

Finally, even if a copyright owner learns of a situation in which a producer would be willing to go outside of the per-use reservoir for his song, this is likely to be but one of a number of potential uses of his song on CTN. To withdraw in order to negotiate a fair price for the one use for which the producer is willing to pursue him outside of the reservoir, the copyright owner will have to forego all uses of his song for which adequate substitutes are available in the reservoir. Thus, even though the copyright owner will have obtained a fair price for one use, he will have had to give up other uses which he otherwise would have obtained

*See AX180 showing that synchronization licenses for specified compositions were requested more than six weeks in advance of the air date of the program in question.

by remaining in the reservoir, and overall he will have been penalized.

Such is the dilemma which confronts the copyright owner in deciding whether or not to withdraw. Professor Fisher's cavalier *ipse dixit* that people "ought to know, so to speak" if they can obtain more than the per-use rate by withdrawing (Tr. 4775) is without rhyme or reason. The copyright owner must divine somehow what program ideas each of CTN's producers will come up with, and divine whether any CTN producers will think of his song as one of the "any number" "that would fit" any of their intended uses (Wright Tr. 419). He must do his crystal ball gazing more than three months in advance of any intended use, and indeed some ten weeks in advance of the gleam of the idea in the producer's eye.

2. Remain—And Be Damned.

A confiscatory feature of the CBS per-use plan is that it forces the copyright owner who leaves his compositions in the per-use reservoir to give CTN free options to use those works at a fixed price. This is not an option freely and willingly given in negotiations, and the owner is to receive no compensation for it. Although even Professor Fisher said

> "* * * it is rational to suppose that in order to get somebody to give you an option for something, you are going to have to pay him something for it, * * *" (Tr. 1701),

CBS plans to take these rights for free.

Under CBS' plan the copyright owner would receive no royalties unless his music were actually used (Sipes Tr. 261). And he would not even receive the assurance that if his work is used, he will be paid the per-use rate, for that rate is only a ceiling. CBS plans to bargain him down from that rate whenever it can.

The testimony of CTN Vice President Donald Sipes has made it abundantly clear that CTN or its producers would

seek music in the reservoir directly from the copyright owners if they thought they could obtain a direct license for less than the fixed per-use rate (Tr. 197-99). Indeed this would be the only circumstance in which CTN would attempt to negotiate a direct license for works remaining in the reservoir:

> "• • • the only reason I would go to a copyright proprietor would be to attempt to get a lower price than under the schedule." (Tr. 198)

In no event would CTN or its producers pay more than the per-use rate for a composition remaining in the per-use reservoir (Sipes Tr. 338). Thus it is obvious that for compositions remaining in the reservoir, the per-use rate is a ceiling. Even CBS' economist Franklin Fisher concedes this (*e.g.*, Tr. 4770).

CBS' testimony has also made it perfectly clear that when a CTN producer approached a copyright owner directly with respect to a composition remaining in the reservoir, the producer would have no hesitation about threatening not to use that copyright owner's composition if he refused to grant CTN a direct license for less than the fixed per-use rate:

> "• • • Perhaps there could be a situation in which a packager or producer of a show felt that two songs might fit into what he wanted to do and he said, 'Listen, do you want to make a direct deal with me? I'll go for you.'" (Sipes Tr. 334)

Sipes testified that he would expect that a copyright owner would be willing to negotiate a license for less than a hypothetical $100 per-use rate (Tr. 334-35) because:

> "The packager can very well—I'm supposing—say to the copyright owner of song B, 'Listen, I can use your song or I could use A song or C song. Do you want to make a deal? Otherwise I'll take C song at a hundred bucks.'" (Tr. 336)

Thus under a per-use system CTN President Robert Wood would expect writers and publishers to grant direct licenses for less than per-use rates

> "Just because of the obvious. They would know that this is a way by which they could have their music performed." (Wood Dep. 62)

Likewise CBS Vice President Richard Jencks testified that CTN producers will "successfully conclude negotiations for music performance rights" (Dep. 71) because the per-use system will motivate the copyright owner to deal with CTN since the system guarantees CTN a license anyway (Dep. 82-83). Thus Sipes testified that if the copyright owner whose works remained in the reservoir refused to grant CBS a direct license, CBS could nevertheless use his song without his permission simply by resorting to CTN's per-use license:

> "He may still decide that he wants to go with B song and pay the hundred dollars." (Sipes Tr. 337)

Such is the plight of the writer or publisher who leaves his songs in the per-use reservoir. He is forced to give CTN valuable free options to use his music at a fixed maximum price; he is to be subjected to threats of non-use; he is forced into a competition with none other than himself; and he is liable to have his music used even if CBS seeks and does not obtain a license from him. As Professor Steiner concluded, the per-use scheme "involves direct negotiations with one arm of the copyright holders tied behind them." (Tr. 4453)

3. Pull—And Be Damned.

The copyright owner who withdraws one or more compositions from the per-use reservoir is in some respects as badly off as the owner who remains, and in other respects is worse off. His exercise of his supposed right of withdrawal is simply not effective with respect to some CTN uses. Thus the CBS proposal would not allow withdrawals

with respect to music which CTN uses "spontaneously" or in some other (unspecified) "unplanned" manner, even though these uses would not constitute "fair use" under the copyright laws. As to these uses the withdrawing copyright owner would have no rights.

Furthermore, the CBS proposal makes withdrawal inoperative with respect to music put in the can before the effective withdrawal date (PX 881, ¶ 6). Therefore, after a copyright proprietor gives the required three months' notice of withdrawal, CTN and its producers can, with all impunity, proceed to put the copyright proprietor's music into their programs and thereby have the right to use that music later under the per-use license at per-use rates. Indeed, considering that we have been told repeatedly that CTN programs are produced on unalterably short schedules (*e.g.*, Wright Tr. 471), it appears that CBS' demand for three months' notice before withdrawal can become effective must be designed to take just this advantage of the copyright owner in the interim.

The major disadvantage, however, that a copyright owner who withdraws compositions will suffer, is that CTN would rarely, if ever, use his music. Considering the views, practices and present tendencies of CTN's variety program producers, Professor Fisher's prediction that the first owners to withdraw would have a "good" experience (Tr. 4779), is a view that is blind to reality.

The disadvantage that CTN will rarely if ever use compositions withdrawn from the per-use reservoir results primarily from the interchangeability among musical compositions. As Wright stated, there are "any number" of "songs that would fit" a producer's intended use (Tr. 419). As Vincent stated, "There would always be, obviously, alternates" (Tr. 586). And as between two reasonably suitable —even though not equally interchangeable—songs ("almost equally good songs that will serve my purpose"), the CTN producer will choose the lower priced song (Wright Tr. 430).

It is clear that CTN and its producers reason that a copyright owner would only withdraw a composition from the

per-use reservoir in order to demand a price higher than the fixed per-use rate: Sipes opined that

> "The man withdraws because he thinks that the song is worth more than is provided for under the per use system, the schedule. That is why he is withdrawing. He is not withdrawing because he thinks it is worthless. He is withdrawing it because he thinks it is worth more." (Sipes Tr. 365)

And Vincent testified as follows:

> "Probably, I would assume, again, the reason they have pulled, and not set a fee, is because they think their song is probably worth more money. That would be the only logical business reason that I can think of." (Vincent Tr. 679)

> "I would think, Your Honor, that the reason they pulled the song out was because they thought they could get a better price than they could if the song were in the reservoir." (Vincent Tr. 697-98; see also Sipes Tr. 132; PX881, ¶ 6)

And CBS' counsel stated:

> "• • • the only valid business reason for pulling music from the per use license is to obtain a higher price • • •." (Tr. 122)

These are the statements, undoubtedly, which led economist Robert Nathan to conclude that CBS would view any withdrawal as a "signal" that that copyright owner would demand more than the per-use rate (Tr. 3933).

Thus one factor suggesting that few owners of withdrawn compositions would be contacted is the conviction of CTN producers that the withdrawn composition costs more than the per-use rate. Another factor is that it would be easier to rely on the per-use reservoir in order to avoid inconvenience and transactions costs. Even now, when the question is merely the synchronization rights prices of alternative compositions, the CTN variety producers tend to summarily reject songs whose synchronization prices are known to be higher than the general range. For instance, Wright

testified that "Happy Birthday To You" is "never used" because of its known high synchronization price (Tr. 428). Likewise, although Vincent indicated that he might try to negotiate a reduced synchronization price for a four-bar use of a Beatles song, his reaction when he was informed that the Beatles catalog was more expensive than most others was, " 'I never get involved with Beetle [sic] songs.' " (Tr. 605)

Similarly in terms of performance rights Wright testified that as between two songs of different price, he would approach the owner of the higher priced song only if he had a "strong" preference for that song (Tr. 444).

Even if CTN's producers were inclined to seek out withdrawing copyright owners and pay more than the per-use rate for a composition, CTN itself would be a restraining influence. For example, although all three of CBS' producer witnesses testified that CTN had promised them more money if they needed it to cope with the CTN per-use system, Sipes said that if a producer wants money to pay more than the per-use rate for a song withdrawn from the per-use reservoir, CTN will not give it to him unless he convinces CTN that they " 'really need this song,' " and "explains • • • why that is so" (Sipes Tr. 71).

Considering the convenience of relying on the per use reservoir, the disinclination of producers to get involved with higher priced songs, the belief of producers that withdrawn songs will be higher priced, and the ability of producers to think of suitable alternatives, it is hard to believe that CTN producers would bother with the owners of withdrawn songs. As Vincent said, "• • • obviously I'm not going to try and go out and create difficulties for myself. • • • nobody needs aggravation. • • •" (Tr. 646-47)

Publisher Salvatore Chiantia, recognizing that for most uses of a song there are suitable substitute songs, concluded that if he withdrew from the per-use reservoir CTN producers "would come to me only when they absolutely needed my compositions," (Tr. 2904) and that works withdrawn would be sought out only if they were "absolutely indis-

pensable" (Tr. 2904, 2911). Consequently most copyright owners would have to leave their works in the per use reservoir in order not to "be effectively cut out of the CBS Network." (Tr. 2906)

Similarly, Nathan pointed out that unless use of a withdrawn composition had "some tremendous overriding importance" CTN would stay away from the withdrawing owner:

> "• • • stay away from this fellow. I'm not going to start negotiating with him, let me turn elsewhere. I can always get other music that's in the repertoire at the per use ceiling and I can negotiate for those who have stayed in for direct licensing of that specific music below the ceiling." (Tr. 3933)

Thus Nathan predicted that

> "• • • the withdrawal right is likely to become a very serious disadvantage to having access to Columbia Television Network." (Tr. 3933-34)

For a copyright owner to lose access to one-third of the national television market is a draconian penalty, making the withdrawal "right" wholly illusory. As is revealed in the trade press excerpts which comprise BX237, exposure of a composition on network television is considered to be "a mighty sales tool" (Cash Box, March 23, 1974, p. 12), and a "key element in record act promotion" (Billboard, November 24, 1973, p. 1), because of the "instant effect it has on the audience" (Record World, January 5, 1974, p. 31), creating "phenomenal sales response" (Cash Box, December 8, 1973, p. 30). Yet foreclosure from the CTN one-third of this market is precisely the sentence to be imposed on the copyright owner who withdraws his compositions from CBS' per-use reservoir.

4. Just Be Damned.

CBS persists in maintaining its fiction that the per-use scheme is not coercive and is "self-correcting" because it will be adjusted at periodic intervals to reflect the prices arrived at in the market place (*e.g.*, Fisher Tr. 1659-60, 4772-74).

The record, however, is clear in all material respects:

> (1) there are interchangeable songs for almost all intended uses (*e.g.*, Wright Tr. 409, 412-13, 419; Vincent Tr. 586);
>
> (2) CTN producers will threaten writers and publishers with non-use of their music in order to obtain direct licenses at lower than per-use rates (Sipes Tr. 334-36; Wood Dep. 62); and
>
> (3) CTN producers will always try to pay less, and will never pay more, than per-use rates for any interchangeable song (Sipes Tr. 338; Fisher Tr. 4771).

Since the circumstances under which direct license negotiations will occur are entirely within CBS' control the consequences are obvious: there will be many direct licenses granted by copyright owners under duress at lower than per-use rates, and precious few licenses sought by CTN producers at higher than per-use rates (see Steiner Tr. 4417). Thus CBS' proposal for periodic adjustments to the per-use rates in light of actual transactions in the market is simply a proposal to drive the per-use rates lower and lower and lower.

The conclusion compelled by the evidence in this case is that CBS' per-use proposal would impose a ceiling on the price to be paid by CTN for music. The so-called withdrawal "right" confers virtually no benefits while foreclosing the withdrawing copyright owner from one-third of his best market for exploitation of his product. This is no right at all. The per-use rate would become an effective ceiling across the board.

When prices are restricted from movement, even in one direction, there is restriction on competition. If the presently existing alternative of direct licensing of performance rights were pursued by CBS there would be neither floor nor ceiling on the prices which could be reached. Since prices under the per-use system could not rise above the fixed per-use rate, the per-use system would decrease price competition.

The CBS proposal for per-use licensing must be rejected as unconscionable to writers and publishers and as an unwarranted foreclosure of competition.

B. The Per-Use License Is Not Sought By CBS For The Reasons Tendered By CBS, But Rather To Put An Up-Side Limit On Price Competition.

The per-use system would, for the reasons stated in Point III. A., place a ceiling on the prices for music performance rights paid by CTN. CBS has offered other "reasons" for its desire for its per-use system. But these reasons are disingenuous; CBS' real reason for wanting the institution of the per-use system is precisely to have the ceiling effect, to place an up-side limit on price competition.

In support of its claim that without a per-use license to fall back on, CTN could not risk any already available licensing program which depended in part on obtaining direct licenses, CBS has proffered the following reasons:

> (1) the CTN producer would not know how or where to find the copyright proprietors (Sipes Tr. 82; Wright Tr. 464, 476);
>
> (2) the copyright proprietors, when contacted for a direct license, would not know what the CTN program producer was talking about (Vincent Tr. 634, 687);
>
> (3) CTN producers operate under such fantastic time pressures that they would not have time to negotiate direct performance licenses (Sipes Tr. 82; Wright Tr. 476-77; Vincent Tr. 633);
>
> (4) even if CTN producers could find the copyright proprietors in time and make themselves understood, the copyright proprietors would be disinclined to deal with them, or would hold them up for exorbitant prices especially for music in the can (Sipes Tr. 82-83; Wright Tr. 465); and
>
> (5) there is no "machinery" set up for getting performance rights directly from copyright owners (Wright Tr. 476-78; Vincent Tr. 633).

CBS' rationalizations as to why it wants a per-use license rather than the direct licenses presently available do not withstand analysis.

1. The Pretense To Ignorance, Inarticulateness and Incompetence

The professed fear of the producers that, if they were to approach publishers for performance rights without a per use license to fall back on, the publishers would not understand what they want, why they want it and what they are willing to pay for it (*e.g.*, Vincent Tr. 687) is absurd on its face. There is no evidence that publishers do not know what performance rights are, and no reason to suppose that they could not understand a clear statement of a specific request for a performance rights license for specific music at a stated royalty.

CBS' other explanations for its preference for its per-use licensing scheme over the direct licensing aspect of the present system are no closer to reality.

The notion that CTN producers would not be able to find the copyright owners was most easily exploded at trial. To begin with, most of the music used on CTN programs is created specially for the program by writers hired for that purpose (Dann Tr. 3250-51). Even CTN producers should be able to find the people they are already dealing with. CBS' counsel has summarized the ready availability of performance rights to special music quite succinctly:

> "• • • there is no reason in the world why the producer at the time he negotiates with the composer, why he can't negotiate for a performing rights license to CBS. • • •" (Transcript, July 10, 1970, p. 50)

As to already published music, there are many ways in which a producer can learn the identity of the copyright owner, and indeed there are many contacts already (see pp. 33-35 above). The clearest proof, however, that CTN producers will be able to find the copyright owners of pub-

lished music is the fact that they already deal with those very owners to obtain synchronization licenses for the compositions they want to use (Sipes Tr. 171-72; Wright Tr. 424-25; Vincent Tr. 602-03; Sunga Tr. 747). Edward "Duke" Vincent conceded that Bernard Brody, the agent his staff used, would have no difficulty in giving him the names or addresses of, or putting him in touch with, any copyright owner (Tr. 686-87; see also Wright Tr. 478-79). Sipes was forced to concede that the channels of communication between CTN program producers and the copyright proprietors are, therefore, already open (Sipes Tr. 199-201). As Professor Fisher put it, "The phone calls get made anyway in order to secure the synchronization rights." (Tr. 4776)

Thus CTN producers would have no difficulty in determining whom to contact for performance rights, whether it be the writers they are hiring to compose the music, or the publishers they are contacting for synchronization rights.

2. The Fleeting Time Problem

Another basis offered by CBS' witnesses for their preference for the per-use system in that CTN producers operate under such intense time pressures that they would not have time to negotiate direct licenses for performance rights (Sipes Tr. 82; Wright Tr. 476-77; Vincent Tr. 633). This argument too is specious.

In the first place, the combination of short production schedules and heavy use of music of outside publishers appears to be limited to a very small number of shows. CBS' only testimony as to time problems related to variety shows (*e.g.*, Vincent Tr. 634-35). Although CBS' producer witness Vincent had been on the production staff of three non-variety shows and only one variety show (Tr. 571-72), CBS asked him *nothing* about the production process, music needs, or potential direct licensing problems of the non-variety shows. CBS' questions were limited to Vincent's views as to musical variety programs (see, *e.g.*, Tr. 623).

Yet non-variety shows such as situation comedies, action series, soap operas, and the like make up the vast majority of CTN programming (see PXs 540-544). There are only two musical variety programs now on CTN, and CTN has announced the cancellation of one of those two (see Broadcasting, April 15, 1974, p. 62).

There are few programs which use music not already controlled by the program producer (See discussion in Point I. A. 1). In fact, only 16.6% of all CTN programs use any identifiable ASCAP music not controlled by the producer. Thus in 83.4% of all CTN programs the producer would not have had to contact any outside publisher to obtain music performance rights to ASCAP music; in another 6.8% the producer would have had to contact one outside publisher, and in another 6.1% at most six outside publishers. Thus, there are only a few shows for which there could possibly be a time problem.

And many of the shows that use significant amounts of music of outside publishers apparently operate on much more leisurely schedules than the weekly variety shows. For example, CBS witness George Sunga testified that variety specials are produced on an approximately six-week production schedule (Sunga Tr. 738). And CBS' contract with the producer of the Captain Kangaroo show—by a wide margin the biggest user of music of outside publishers on the network—provides that the producer must submit complete music use information to CBS three weeks prior to commencing production (BX 218).

The "time problem" then, appears to be a condition peculiar to variety shows.

Of course, the two variety shows do operate on short production schedules today. And variety producers today are required to obtain television synchronization rights from the copyright holders. This direct dealing is accomplished within the confines of these short production schedules (Wright Tr. 424-25, 478-80, 527). With adequate preparation, there appears to be no reason that direct dealing for performance rights could not also be accomplished within the requirements of these schedules.

3. The Myth of the Hold Up

The next "problem" conjured up by CBS is the speculation that writers and publishers would be "disinclined" to deal with CTN or its producers for performance licenses. As discussed in detail at Point I. B. above (pages 118-20), subjective preferences or attitudes, even if proven, would not rise to the level of an antitrust violation. The relevant issue is what writers and publishers would actually do; as to this, the evidence is overwhelming that there would be no effort to "hold up" CTN.

All witnesses agreed that composers of special music would deal directly with CTN or its producers. CBS' own producer witnesses admitted that the composers who are hired to create music for the program would of course be willing to grant performance rights (Wright Tr. 488-89; Vincent Tr. 726). Indeed these composers already normally directly grant the synchronization rights for their music in the contract by which they are hired (Wright Tr. 494; Vincent Tr. 722-25).

John Green, himself a composer of special background music, testified that he would be inclined to negotiate with CTN because he likes the exposure and he likes to be paid (Tr. 3457-59). He stated that he would be surprised if other background composers would not feel exactly the same way (Tr. 3457-58).

Former CTN Vice President Michael Dann, who as CTN programming chief bought more television programs than any other person (Tr. 3215-16), pointed out that the "average composer" is out of work, and will jump at the chance to score a television show (*e.g.*, Tr. 3276, 3278, 3280, 3372). Thus with respect to specially composed music, which is most of the music CTN uses (Dann Tr. 3250-51), it is undisputed that the writers would grant CTN performance licenses.

As to published music, composers and copyright owners have testified at trial and in depositions that it would be "stupid" and "suicide" for them to try to hold up CBS; they would negotiate performance rights with CTN in order

to get their music used. Sal Chiantia of MCA (parent of Universal Pictures, which is the leading producer of television motion pictures) (Tr. 2856-59), stated definitively that if CTN or its producers came to him directly for performance licenses he would certainly negotiate with them (*e.g.*, Tr. 2884-86, 2942, 2948, 2955, 2957-58). The major impetus for publishers to deal directly with CTN is a simple matter of good business sense. As Chiantia said, his primary responsibility is to get his music played (Tr. 2957), and there are only three games in town (Tr. 2947). Chiantia said he has no intention of committing commercial suicide by being difficult for CBS to deal with (Tr. 2890-91, 2896, 2898, 3046-47, 3052, 3056-57).

Alan Shulman of Belwin Mills testified that he would be prepared to negotiate direct licenses with CTN or its representatives (Tr. 3089) and Arnold Broido of the Theodore Presser Company stated that "of course" he would deal directly with CTN, and so would most publishers—they would have no choice (Tr. 3492-93, 3498).

At deposition Edwin Morris, despite his historically grounded apprehensions (see pp. 71-74 above), testified that if CTN cancelled its ASCAP license, he would negotiate for direct performance licenses (Dep. 39, 139, 212-14, 254-55). Leon Brettler also stated that if a broadcaster had no ASCAP or BMI license and a producer called for a direct license he would negotiate—he might be blacklisted if he did not (Dep. 184-85, 303-06). Brettler stressed the value of television network exposure (Dep. 300; see also trade press excerpts in BX237), and predicted that there would be a "wild scramble" among publishers to license broadcasters directly (Dep. 300), veritable "hoardes [*sic*] of desperate publishers" descending on producers and broadcasters (Dep. 304) in a "mad rush" to protect their interests (Dep. 303). "It would be very nice", said Brettler, if there were ten or twenty or 100 television networks for the publishers to deal with instead of only three (Dep. 305), but "• • • we only have those three doors open to us • • •." (Dep. 295-96)

Composer Aaron Copland testified that he and most composers will do whatever is necessary to have their works

performed. If this means dealing directly with CBS, they will do so (Tr. 3486). Even CTN's producer witness Vincent, who used to be a songwriter (Tr. 691), testified that he would be willing to make a deal for a direct performance license (Tr. 694-95). Composer Burton Lane, former president of AGAC, testified that he would be willing to consider any deal concerning his songs, and that whether agreement would be reached with CBS would depend on the terms (Tr. 1133, 1175-76).

The witnesses who have had a great deal of experience dealing with composers and publishers over the years supported these views. Officials of the Harry Fox Agency testified that requests by producers for synchronization licenses for music already in the can are not uncommon (Berman Tr. 979-82), and that writers and publishers have not held up producers (Engle Tr. 883; Berman Tr. 966). The producers feel confident that they will not be held up because they realize that the writers and publishers want their music used again:

> "• • • the users and providers of music have to live together. Nobody wants to lock himself up in a closet and not have them used. The producers are aware of that. It is a common interest that would prompt this type of action." (Berman Tr. 982)

Michael Dann testified that even the most important composers

> "• • • all realized the importance of network television • • •. I have always found them intensely eager to have their works performed on the air as quickly as possible • • •." (Tr. 3275)

BMI President Edward Cramer testified that writers and publishers would be inclined to grant CTN direct performance licenses, because they like to have their works performed on network television not only for the performance royalties, but because network exposure also enhances the popularity of the music and stimulates record sales (Tr. 4285-87; see Tr. 4282-85).

4. A Word on the Credibility of Sipes and The Trio

The witnesses who testified that CBS could not possibly operate under any alternative to blanket licensing presently available but must have the per-use system were CTN Vice President Sipes and CTN producers Wright, Vincent and Sunga. Despite the presence of clauses in many millions of dollars worth of contracts giving CBS performance rights to BMI and ASCAP music, either outright or contingently (see pp. 84-89 above), Sipes maintained that no one at CBS had ever sought performance rights directly (Tr. 115, 155, 182-83, 304).

The producer trio, without ever having had any contact whatever with a writer or publisher on the subject of licensing performance rights (Wright Tr. 513; Vincent Tr. 637-40, 687-88), freely speculated that writers and publishers would be disinclined to grant such rights directly under the present system.

Sipes and the trio claimed that the time pressures of program production made them prefer per-use—even though per-use would not alleviate those pressures. And the trio, in order to glorify CBS' proposed relief, professed ignorance and incompetence to deal with any of the alternatives to blanket licensing presently available. The parallels in the substance of the testimony given by the trio were exceeded only by the parallels in the language they used.

As producers of network television programs, Messrs. Wright, Vincent and Sunga have only three customers for their products. CTN is one-third of their market (Vincent Tr. 653; Sunga Tr. 760). Robert Wright testified that he agreed to become a witness for CTN long before he learned about the system for which he was expected to express a preference, and his first question of Sipes was not what the system involved, but whether he would get enough money from CTN to cover any additional expenses resulting from its adoption. It was perhaps two months before the trial that Wright was contacted by Sipes (Wright Tr. 533), and the essence of their conversation was simply that Wright would testify for CBS and that CBS would pay

any additional expenses he incurred under the per-use system (Wright Tr. 530-31). Until just before trial, all Wright knew were the name of the system and that he would not lose any money by its adoption (Tr. 462). It was just two business days before trial began that Wright first learned the details of the system he was to endorse; he had given no serious thought to the subject before that time (Tr. 461-62). Wright testified that "• • • the money side of it • • • was my first concern • • •" (Tr. 531). He said that in his view the question of money was "primary", "I consider it number one." (Tr. 534-35)

Vincent, who was out of work and looking for a job when CBS contacted him (Tr. 653-55), also received assurances from Sipes that if he needed more money under the proposed per-use system he would get it (Tr. 660-61). Although Vincent had several conferences with CTN, his potential customer, he refused even to talk to ASCAP's counsel or return his calls (Tr. 647-51) even though Vincent is a member of ASCAP (Tr. 691). He said he "had no reason to want to talk to" ASCAP's lawyers (Tr. 651). Likewise shortly before testifying CTN producer George Sunga, who was employed by CBS for 11 years, asked for and received assurance from Sipes that CTN would supply any additional funds needed by Sunga under the per-use system (Tr. 759-60, 769-70).

In evaluating the CBS testimony as to why CTN could not operate under the alternatives available in the present system, it is significant that the producer trio were asked to testify by one of their only three customers, and that their first concern was reimbursement rather than the merits of the scheme they were asked to endorse.

5. The True Nature of "Machinery"

Having seen that CTN knows whom to contact for performance rights, that for well over 90% of CTN programs time is really no problem, and that writers and publishers are in fact willing to deal, we come finally to the problem of "machinery".

Second only to the elements of the per-use system itself, the hardest thing to pin down in this case has been just what CBS' witnesses have meant by "machinery" when they said that direct licensing is not feasible because there is no "machinery", and that the per-use system would provide "machinery" (*e.g.*, Wright Tr. 476-77; Vincent Tr. 633-35, 685-87).

At first it seemed that what CBS meant by "machinery"* was middlemen. Sipes opined that under the per-use system, "machinery" similar to talent agencies for non-musical program elements and to the Harry Fox Agency for synchronization rights, would "spring up" to "broker those deals" (Tr. 75).

But it turned out that such agencies are not what was meant by "machinery". Wright testified that even if the Harry Fox Agency were asked to broker performance rights the agency would not constitute the necessary "mechanism", because "you have no system." (Tr. 480) If Harry Fox were to deal in performance rights, according to Wright, one would have to "give him some guidelines, give him an orderly mechanism to do it." (*Id.*) The "mechanism" would assure CTN that there would be no cumulative ("snowballing") obstructions or blockages in the clearance of performance rights (Tr. 482-83). The mere authorization of the Harry Fox Agency to broker performance rights would not guarantee the CTN producer that his "operation would be smooth and quick" (Tr. 483).

Since "machinery" meant more than a middleman authorized to deal in performance rights, it was thought that perhaps "machinery" meant the computer together with the cathode ray tubes that CTN wants to put into the offices of its two (soon to be one) variety show producers (Sipes Tr. 67-70; Wright Tr. 476-77). But Wright's testimony showed that the computer was not what was meant by the "mechanism". Wright said he would be wary of adopting an unfamiliar system of obtaining performance rights,

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* Sometimes also called "mechanisms"—*e.g.*, Tr. 74.

"Unless there is a firm, solid, predetermined mechanism set up for me to use.

• • •

"Q Well, what is it about the per use world that Mr. Hruska postulates for you that makes you less nervous about that than the direct licensing world?

"Is it that computer with the printout in your office?

"A Yes, that's very—

"Q Suppose we gave you a computer with a printout in your office? Would you be just as happy?

"A *As long as all the other things are there with it, sure.*" (Tr. 500; emphasis added.)

Since the computer and cathode ray tube need "all those other things with it" to be a "firm, solid, predetermined mechanism", one had to look further to learn what the machinery or mechanism might be.

One thought the "mechanism" might be data that were stored in the computer; Vincent said that as CBS' counsel described the per-use system to him there would be "machinery" that would give him information very rapidly (Tr. 720), and said that

> "The most important piece of information to me was the name and telephone number of someone who was authorized to deal for that particular piece of music and who was expecting my call in effect. That when I called, they would know exactly what I wanted and why." (Tr. 718)

Because of this and because CBS had claimed that producers could not directly license performance rights because they would not know where to find the copyright owners (Sipes Tr. 82; Wright Tr. 464), one thought that perhaps the names and addresses were really the "machinery" or "mechanism".

But it turned out that that was not it either:

> "I don't believe that just that name and telephone number is going to do me any good because when I pick up that telephone and I dial that number, whatever music publishing company I am dealing with, or whatever copyright owner, I have no reason to expect that there is someone on the other end of the line *without any machinery set-up* with whom I can deal, who will *understand* what I want, why I want it and *what I am willing to pay for it.*" (Vincent Tr. 687; emphasis added.)

But here at last was a good clue: the "machinery" tells the copyright owner what the producer is willing to pay for the performance license. And Vincent went on to tell us that "the machinery is terribly important" and "has to be there" so that the copyright owner "will have an attitude with which I can deal." (Tr. 698)

To determine exactly what is meant by "machinery" or "mechanism", therefore, one must examine the CBS testimony in its entirety and ask,

> "What is it
>
> (a) that would be 'firm, solid and predetermined',
>
> (b) that would give a middleman 'guidelines' in negotiating with copyright owners,
>
> (c) that would minimize breakdowns in price negotiations, discourage cumulative breakdowns and make negotiations 'smooth',
>
> (d) that would tell the copyright owner 'what the producer is willing to pay', and
>
> (e) that would create 'an attitude with which the producer could deal'?"

The answer is, it is a ceiling price. Only a ceiling price fits all of these criteria.

A ceiling price would tell the copyright owner what the producer is willing to pay. It would create an attitude with

which the producer could deal because the ceiling would be firm, solid and predetermined. Having this firm, solid and predetermined ceiling would all but eliminate demands for more than the per-use rate, and would certainly discourage any "snowballing" of demands for more than the per-use rate.

When the CBS testimony is examined carefully, therefore, it becomes clear why CBS and the CTN program producers prefer the per-use system to a system of direct licensing. In direct licensing the upper limit on what a copyright owner could charge would be determined solely by competition. In the per-use system there would be an up-side limit on that competition. The preference for the limitation on competition effected by the per-use system is what CBS masks in its use of the coined term "machinery". Thus it is no wonder that, despite his nearly complete ignorance as to the workings and cost of per-use (see Point I.C. above), Sipes did not think of per-use as "gambling" (Tr. 245).

IV.

CBS' DEMAND THAT BMI AND ASCAP BE ENJOINED FROM LICENSING ANY TELEVISION NETWORK IS CONTRARY TO DUE PROCESS, THE ANTITRUST LAWS AND THE PUBLIC INTEREST.

CBS proposes that if its per-use scheme is not adopted, BMI and ASCAP should be enjoined from granting public performance licenses to any television network.* This relief cannot be granted because no evidence has been presented to show that BMI's and ASCAP's licensing of television networks in general, or of NBC and ABC in particular, violate any provision of law, because such an injunction would be contrary to the antitrust laws and the public interest, and because NBC and ABC, at whom the injunction request is aimed, are necessary parties.

A. No Evidence Has Been Presented To Suggest That The Licensing Of NBC And ABC Television Networks Violates Any Provision Of Law.

From the time CBS first suggested that the licensing of television networks by BMI and ASCAP should be enjoined, the principal question has been how can NBC and ABC be deprived of BMI and ASCAP licenses at the behest of CBS. That question, after nearly two months of trial and hundreds of pages of post-trial briefing by CBS, has yet to be answered.

To begin with, it must be recognized that what CBS requests is not simply an elimination of the blanket license; nor does it request a ban against BMI's and ASCAP's licensing of broadcasters in general. CBS' request is at once a very broad and a very narrow one: it seeks a ban against BMI's and ASCAP's granting *any* form of license, but *only* with respect to television networks.

* Except for such uses as to which CBS nevertheless asks for a per-use license.

CBS has presented no evidence to support its theory that BMI and ASCAP should not be allowed to license television networks. There is no violation in the mere fact of a licensing organization's granting a license to a broadcaster. Indeed, the fact is that while seeking this injunction, CBS continues to seek blanket licenses from BMI and ASCAP for its own radio and television stations (see AX 3, AX 4, AX 5). CBS has shown nothing to suggest that the fact of licensing a television network, as opposed to the fact of licensing a television station or a radio station, is somehow a violation of law.

Nor has CBS presented any evidence that the existing contracts between the licensing organizations and NBCTN and ABCTN violate any provision of law. NBC and ABC have never taken any kinds of licenses other than blanket licenses (Cramer Tr. 4252), and indeed have insisted on having blanket licenses (see Finkelstein Tr. 3610). These are the very types of licenses which, when opted for by both parties, the United States Supreme Court has said are perfectly valid under the antitrust laws. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 138 (1969).

In the absence of any evidence showing that the licensing of television networks is inherently evil, or that provisions of the existing television network licenses violate some provision of law, CBS' demand that BMI and ASCAP be enjoined from licensing the NBC and ABC television networks cannot be sustained.

B. The Proposed Injunction Would Be Anti-Competitive And Contrary To The Public Interest.

The truth which emerges from the evidence in this action is that CBS' injunction request is not designed to cure any antitrust ill, but is rather an attempt to limit competition between CTN and the other two television networks.

CBS' proposal is totally contrary to the goals of the antitrust laws. The antitrust laws are designed to preserve, not eliminate, alternative means of supply. They

are intended to promote, not eliminate, competition. There can be no conceivable justification for CBS' proposed elimination of sources of supply for NBC and ABC in order to shield CBS from competition. As the economic experts testified, this proposed elimination of alternative means of supply is so "totally contrary" to the objectives of competition (Nathan Tr. 3961) as to be "ridiculous" (Steiner Tr. 4418).

Clearly competition cannot be increased by the elimination of competitive alternatives; the elimination of alternatives can only reduce competition. This principle—obvious enough in the abstract—is dramatically confirmed by an analysis of the effect an injunction would have. If CBS determined that blanket licenses were too expensive and undertook to license performance rights directly, there would be two possible results. On the one hand, it could turn out that CBS was absolutely right and that direct licensing would prove cheaper. In this event, NBC and ABC could be expected quickly to follow suit. No injunction would be required to cause them to abandon blanket licenses; they would do so voluntarily.

On the other hand, it could turn out that CBS was wrong and that blanket licensing was actually—at least in the view of ABC or NBC—the most desirable method of licensing performance rights—whether because of lower cost, greater programming flexibility, or both. In this event, NBC and ABC could be expected to cling firmly to their blanket licenses and to yield them only if enjoined to do so.

The true role of the injunction is at once apparent: it is to eliminate NBC's and ABC's advantage if it turns out that the blanket license is indeed the cheapest and most efficient, most desirable method of licensing performance rights. This effort to use the antitrust laws to eliminate a market transaction in the event that it turns out to be the cheapest and most efficient method of operation is an almost incredible attempt to pervert the purposes of these laws. But this is exactly what CBS wishes to do.

CBS fears that it may be wrong about the blanket license and fears the consequences if it is wrong. Thus, Sipes testified that NBC and ABC "would like to stay in the blanket license and watch me destroy myself", and that any attempt by CBS to make do without any license from a licensing organization would put it at a "terrible competitive disadvantage" (Sipes Tr. 86). Similarly, CBS' counsel has said, "no competitor [who did not obtain a license from a society] could allow its competitor to have a license with that pool" (Transcript of Argument, September 14, 1971 p. 55)—hence CBS' attempt to foreclose its competitors' access to these alternative sources of supply.

Sipes testified at trial that an attempt by CTN to do without a BMI or ASCAP license would "of course, creatively affect our programs. They will be badly hurt. CBS' programs will be badly hurt. * * *" (Sipes Tr. 84). Dr. Frank Stanton testified at deposition that "the broadcasts produced for CTN would suffer or could suffer from a creative point of view." (Stanton Dep. 173) William Paley stated that such a situation would be a handicap on the stylistic and cultural fronts (Paley Dep. 110-11). And CTN President Robert Wood stated that CTN programming would have a "second-class appearance", and "would be bush league compared to NBC and ABC." (Wood Dep. 56-57) Thus, CBS says, if the blanket license turns out to be best, our competitors cannot be permitted to have it; otherwise they will be able to take competitive advantage of our bad business decision to license directly.

There can be no question that an injunction would be contrary to the interests of the other networks, of the public, and of competition generally. The blanket and per program aspects of the present system have proven to be of immense value to the program producer and to the public. The immediate and certain access that blanket and per program licenses afford to vast numbers of compositions provides the producer with complete creative flexibility to program in the public interest, with low transaction costs. If NBC and ABC are deprived of the cheapest and most efficient

market transaction, they will either have to spend more money or cut program quality or both. To the extent that they must spend more money, they are hurt. And to the extent that program quality is reduced, the public must suffer.

Program quality is a major area of competition among CBS, NBC and ABC, and is perhaps the principal area of competition directly affecting the public interest. CBS is not entitled to interfere with the efforts of its competitors to present the best quality programming to the television-viewing public.

C. The Proposed Injunction Cannot Be Granted Because NBC And ABC Are Indispensable Parties.

It is elementary law that persons whose interests are sought to be affected by the relief requested in a lawsuit are indispensable parties. If parties to contracts which are sought to be enjoined are not parties to the lawsuit the demand for such relief must be denied. *Northern Indiana Railroad Co.* v. *Michigan Central Railroad Co.*, 56 U.S. 233, 246 (1853); *Shields* v. *Barrow*, 58 U.S. 130, 139-40 (1854); *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 124 (1968); 3A Moore, *Federal Practice* ¶¶19.01, 19.05 (2d Ed. 1974).

In *Shields* v. *Barrow, supra*, the U.S. Supreme Court laid down the definition of indispensable parties as

> "• • • Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (58 U.S. at 139)

The Court went on to state that

> "A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the Court, a decree of rescis-

> sion must either destroy the rights of those who are absent, or leave the contract in full force as respects them * * *." (*Id.* at 140)

In 1968 the Supreme Court stated that the rules of *Shields* v. *Barrow* concerning indispensable parties are "still valid today". *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra,* 390 U.S. at 124.

In the *Northern Indiana Railroad Co.* case, *supra,* the Supreme Court was confronted with a request for an injunction to prevent performance of an agreement between two railroad companies for the construction of a railroad. One of the parties to the contract, the New Albany & Salem Railroad Company, was not made a party to the lawsuit. The court concluded that it had no power to grant the injunction request:

> "* * * in a case like the present, where a court cannot but see that the interest of the New Albany Company must be vitally affected, if the relief prayed by the complainants be given, the court must refuse to exercise jurisdiction in the case, or become the instrument of injustice." (56 U.S. at 246.)

In the present case it is precisely the interests of absent parties which CBS seeks to affect by its injunction request. Under the above authorities the court has no power to issue such an injunction, for to do so would be a denial of due process.

CBS seeks to circumvent these elementary principles by asserting that they do not apply to contracts which conflict with the policy of statutes (Post-Trial Brief p. 75). Even if this were an accurate statement of law in the abstract, it certainly has no application to this case, for CBS, far from showing any statute or policy or provisions of law which conflict with the licensing of television networks in general or of NBC and ABC in particular, has instead demonstrated that the very purposes for which it seeks this injunction are contrary to the antitrust laws and to the public interest.

V.

CBS' DEMANDS WOULD UNCONSCIONABLY BURDEN THE MUSIC INDUSTRY AND THE COURT.

CBS devoted a surprisingly large amount of trial time to demonstrating the propositions that computers work and that they can perform numerous mechanical operations—propositions not in dispute. Computers, however, do not have judgment, and the numbers and natures of the judgments that would have to be made if the per-use system were imposed on the music licensing industry and this Court make the per-use system unworkable.*

A. Fixing Per-Use Rates: A Judicial Quagmire

The fixing of per-use rates would be a mammoth operation. There is little or no chance that the parties could agree on per-use rates, and the enormous task of setting dozens of rates would fall to the Court.

CBS has held out a ray of hope that the parties themselves might be able to negotiate a set of per-use rates (see, *e.g.*, PX881 ¶ 3). In support CBS has pointed out that with respect to judicial rate fixing proceedings under the ASCAP consent decree, the parties, eventually, have always come to agreement without Judge Ryan's actually having to set rates (Plaintiff's Findings, ¶ 10). This argument ignores both a fundamental difference in the nature of the licenses involved, and the history of distribution litigation before Judge Ryan.

As economist Peter Steiner observed, there is no doubt about what a blanket license is, what privileges it confers, what its purposes are. The blanket license is "a well-

* The proposed injunction against the licensing of the NBC and ABC television networks suffers the same unworkability as the per-use system, since CBS asks that the injunction not apply to music in the can, or to spontaneous or other unanticipated performances, but demands a per-use license for these uses (Post-Trial Brief p. 2).

defined thing" on which the parties could, therefore, come to agreement as to price, period of time, and so forth (Tr. 4473-74). The per-use license, on the other hand, would be one type of mechanism if the unit prices were set high, and a very different type of mechanism if they were set low.

If it is intended, as CBS has suggested (Sipes Tr. 72-74), that the vast majority of performance licenses will eventually be obtained by CTN directly from writers and publishers, the per-use license could be used as a form of insurance for unanticipated uses or short-notice uses. If this were the case, the per-use rates would appropriately be set at a high level. As Professor Steiner pointed out, this would give the network protection against infringement without confining copyright proprietors under too low a ceiling price (Tr. 4474).

However, CBS has proposed that the per-use rates be fixed at levels approximating the average rates of existing or past transactions (see PX881). Fixing a low set of per-use rates, and permitting CTN to bargain down from these levels in direct licensing transactions, makes the per-use structure a mechanism that is, in Professor Steiner's words, "almost in principle of a different kind * * *." (Tr. 4474-75)

Since the licensing organizations and copyright owners on the one hand, and CBS on the other, will be negotiating to establish in effect fundamentally different systems, the parties are unlikely to be able to reach agreement on per-use rates. Thus Professor Steiner concluded, "It seems to me it would be a substantial and unreconcilable breakdown in those negotiations." (Tr. 4475)

Secondly, in relying on Judge Ryan's never having had to establish a final rate for a broadcaster license, CBS has taken too narrow a view of the litigation before Judge Ryan. In addition to setting a number of interim rates, Judge Ryan has had to decide disputes involving amounts to be distributed to different categories of ASCAP members. Indeed, there is now pending before this court a very lively dispute over the amounts to be paid to ASCAP

members for performances on morning television. In a per-use world, the questions of license fees and distribution will inevitably merge. As soon as license fees are set for different categories of performances, ASCAP members having those kinds of performances will be drawn into the debate and will provide another source of disputes.

CBS has sought to dismiss this problem by claiming that the licensing organizations would not have to distribute per-use fees to the members whose works are performed. This answer is inadequate. ASCAP's consent decree requires it to give primary consideration to performances in making distributions to its members (CX 2, Ex. 10). Finally, for ASCAP not to distribute per-use revenues to members whose works were performed would be to induce all such members to withdraw, leaving CBS only with direct licensing, an option open to it without the need for litigation.

For these reasons, it would fall to the Court to determine the rates* for each of the various possible uses of music.

There are more than two dozen categories of television network performances in the BMI writer and publisher payment schedules which carry separate rates of payment (PX469; PX470). These categories are, needless to say, only the most basic ones possible, covering feature, theme and background uses, which are further subdivided in terms of length and repetition of performance. Merely reaching a determination as to the proper per-use rate for each of these 24 categories as presently defined in the BMI writer and publisher payment schedules would be difficult enough for the Court; when coupled with the problem of devising different sets of rates for different users, the process becomes one of staggering magnitude.

The facile solution of adopting the relative weights given to the various kinds of performances by the licensing organizations is not available, because the licensing organizations

* In CBS' March 20, 1972 *Memorandum Regarding The Nature Of The Per-Use License It Proposes*, p. 6, CBS recognizes that negotiation between the parties to set per-use rates "is not likely to succeed."

do not agree on the relative values of the various kinds of performances. While the systems are not directly comparable, it is clear that ASCAP gives substantially more weight to feature performances in relation to other kinds of performances than does BMI.

Further, it is possible that the Court would be called on to set different sets of per-use rates for different compositions.

Nor would the Court be confronted with this task only once, for if CBS' proposal is adopted the per-use fees would have to be revised and readjusted again and again in an attempt to bring them into line with the market prices of music licensed directly (Tr. 1659-60, 4772-74).

Moreover, unless per-use rates are made substantially more detailed and discriminating than present writer and publisher distribution schedules, each writer and publisher would be forced unfairly to compete against himself. The problem, of course, is that some uses of each general type are simply worth more than others of that type. As ASCAP's general counsel, Herman Finkelstein, explained,

> "If you are trying to fix licenses for specific uses, you would have to find out what program the work is going to be used on, how much the artists are getting on that program. * * *
>
> "You can't for purposes of selling, as distinguished from distributing, you can't fix a price without knowing about the program in which the work is going to be used." (Tr. 3646)

Indeed, with respect to public performance rights for motion pictures, which are already licensed directly, copyright proprietors reach their decisions on the basis of just such factors as those outlined by Finkelstein, and their considerations are by no means cut and dried. For example, Leon Brettler, of Shapiro, Bernstein, and Edwin H. Morris, of Edwin H. Morris Publishing Company, both testified on deposition that there was no "rule of thumb" by

which such prices would be determined (Brettler Dep. 212; Morris Dep. 118). Brettler asked rhetorically:

> "• • • Is there a rule of thumb that every picture is absolutely identical, the budget is the same, the stars are the same?" (Dep. 212)

Brettler testified that in arriving at a price he would consider the specific setting and the time period of the picture (Dep. 221-22), the size of the film's budget (Dep. 217), and "who is the company and what are our relationships with them" (Dep. 216). But, said Brettler:

> "The prime consideration is the film, the type of use, what I consider the relative importance of the song, the stars of the film, how important it really is for the producer to use our particular copyrighted work • • •." (Dep. 216)
>
> "I wouldn't begin thinking of the range [of prices] until you told me who was going to sing it, whether it was visual, vocal and [what] the principal focus of attention of the audience would be • • •." (Dep. 220)

Morris, too, said he would need to consider a sizeable number of factors beyond the mere stage setting for the composition:

> "Q • • • What more would you want to know from me before you set that price?
>
> "A The artist involved, which would have some bearing on the value of the performance, how it is done, how many times. I don't think there is [*sic*] any two situations that are quite the same." (Dep. 118)

And again, Morris stated:

> "Every situation is different. • • • It depends on the importance of the use.
>
> • • •
>
> "I would say this, that sometimes, not only the nature of the composition but the author and composer have a bearing as to values. A name does have value." (Dep. 118, 120)

In short, when payment is going to be made for a particular use the price should be related to the value of that use.

If the per-use rate system is not extremely detailed and closely related to each particular kind of use but instead makes broad classifications, the copyright owner will be at a considerable disadvantage. In each case, CBS would have the choices of two rates—an individualized rate quoted by the copyright owner taking into account the particular circumstances and a general "homogenized" rate under the per-use license. CBS, then, could have its cake and eat it. When the individual circumstances dictated a high price, CBS would choose the lower "homogenized" rate, and when the individual situation called for a lower price, CBS would take it. To devise a per-use schedule which would not be used as an instrument of oppression in this way would be enormously difficult.

As CBS' counsel has stated,

> "• • • trying to figure out in the abstract how much each piece of music is worth. That is very hard. There is only one way where it is not hard and that is to put that music in a competitive market and let buyers and sellers in that market determine what that price is • • •." (Transcript, September 14, 1971, p. 77)

That is why the per-use system sets this Court an impossible task—because the value of a use cannot be determined in a vacuum.

B. Administering The Per-Use System: A Continuing Quagmire.

Once the Court had set per-use rates for all the uses and the per-use system had been put into effect, the Court would be confronted with the task of supervising its operations from that time forward. And since the per-use system has a built-in capacity for producing an endless series of costly disputes, its supervision would be likely to be a continuous drain on the resources of the licensing organizations and the Court.

The principal area of difficulty probably would lie in the classification of actual uses. With classification of uses assuming importance in determining the amount of the fee, the licensing organizations would have to do much more in the way of monitoring than they do now. Even after monitoring, a number of disputes would remain for court resolution. The Court would have to exercise the ultimate judgment as to which of the categories in the rate schedule covered a given use. Classification of music uses is by no means a science, and when classification becomes controlling in terms of the amount of the license fee payable in respect of a particular performance, disputes are inevitable. For example, Carol Burnett sings her closing theme on camera. Is this a theme or feature use? Again, music accompanying dancers is classified by BMI as feature music. Is music accompanying tractors dancing in front of a barn on the Captain Kangaroo show feature or background? The burden of resolving such disagreements will be squarely on the Court.

In addition, counsel for CBS has repeatedly mentioned another of the areas likely to produce litigation under the per-use system: the question of what uses of music by CBS from the per-use reservoir would be exempt from payment under the "fair use" doctrine (*e.g.*, Plaintiff's Trial Memorandum, p. 35; Tr. 55-56). If CBS would not be required to pay for such uses under the per-use system, it would have every reason to press the "fair use" doctrine as far and as fast as it could. Thus Herman Finkelstein predicted that ASCAP "would be in litigation constantly with CBS about whether a given use was or came within the scope of fair use * * *." (Tr. 3616-17)

Finkelstein's conclusion that the administrative costs of a per-use license would be extremely high is supported by experience. Finkelstein testified that the administrative costs involved in the vastly simpler per program license were such that both broadcasters and ASCAP lost money on those licenses (Finkelstein Tr. 3617).

When the extra expense to the licensing organizations in additional legal staff to handle per-use disputes (see, *e.g.*, Finkelstein Tr. 3649), and the "very substantially" increased administrative costs (see Finkelstein Tr. 3650) are added to the burden on the Court, it becomes apparent that the per-use system proposed by CBS is simply unworkable.*

CONCLUSION

The evidence presented at trial has demonstrated that the present structure of the music licensing industry presents CBS with a range of competitive alternatives suitable for the music needs of its television network. Given the nature of CTN's music usage CTN could obtain performance licenses directly for all or almost all of its programs. For any remaining programs, BMI and ASCAP per program licenses are available.

The fact that direct and per program licenses are realistic alternatives is overwhelmingly established. There are no barriers, either mechanical or motivational, to the granting of direct licenses to CTN. Writers and publishers are available to deal with CTN, and are anxious to have their music performed on CTN. The notion that copyright proprietors would try to hold up CTN is contradicted by their testimony, by the evidence as to their direct licensing of performance rights and synchronization rights in the past, and by simple recognition of the objective facts of CBS' size and status in the music industry and the value of television network exposure.

Since alternative sources for performance rights exist, BMI and ASCAP, by offering blanket licenses, have in no way compelled CBS in restraint of trade or monopolized any relevant market. CBS' fear of exploring uncharted seas while NBC and ABC cling to the safe, sure, efficient and inexpensive blanket licenses does not in any way mean that BMI and ASCAP have violated the antitrust laws. If

*Both in itself and as part of the half-injunction, half-per-use proposal.

CBS believes that a competitive advantage over the other networks could be obtained by pursuing direct licensing, it must pursue that course in a competitive market and take the competitive consequences if it is wrong.

Apart from the merits, the relief demanded by CBS would unconscionably deprive writers and publishers of their property. The proposed per-use system, with its ceiling effect on royalty rates, would be a gross injustice to writers and publishers. This system has been unmasked for what it really is: an attempt to limit the competition that could occur if CTN sought performance licenses directly. If CBS' repeated refrain that it wants to buy performance rights in a "free and competitive" market is not a hollow one, let it buy those rights in a market in which prices are allowed to move up as well as down.

The injunction proposal is no more justifiable. It would remove from the market the form of transaction which most users have found to be the most economic and efficient and would thereby limit the competitive options of music users. The antitrust laws may not be used to insulate a plaintiff from competition.

BMI urges that this Court enter judgment in favor of the defendants.

Dated: New York, New York
June 3, 1974

Respectfully submitted,

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GLOSSARY

Above the Line	As used in the TV industry, the creative elements (performers, directors, etc.), as opposed to elements such as cameras and production facilities. (See, *e.g.*, Tr. 66) See "Below the line."
Adams, Berle	Officer of MCA, *q.v.* (See, *e.g.*, Tr. 1364).
Adams, Stanley	President of ASCAP and lyricist. (See, *e.g.*, PX 250 (Adams Dep.) 6) Portions of deposition in evidence.
AGAC	American Guild of Authors and Composers, *q.v.* (See, *e.g.*, Tr. 992)
Ahlert-Burk Corp.	Music publisher which directly licensed 3M. (See AX 194)
American Guild of Authors and Composers (AGAC)	Trade association formed in 1932 (as the Songwriters Protective . ociation) to represent the interests of music writers. No connection with any defendant. (See, *e.g.*, Tr. 992)
Amor Publications	Music publisher which directly licensed 3M. (See AX 220)
Appel, John D.	Deputy General Counsel of CBS. (See, *e.g.*, Tr. 1261)
April Music, Inc.	Music publisher; CBS subsidiary; ASCAP member. (See, *e.g.*, Tr. 1799-1800, 1826)
Arlen, Harold	Composer; member of ASCAP Board of Directors. A defendant in this action. (See AX 234)
Arrow, Allen H.	Attorney who represented 3M in M-700 negotiations. (See, *e.g.*, Tr. 1256-57) Witness at trial.
ASCAP	American Society of Composers, Authors & Publishers, performing rights licensing organization formed in 1914. A defendant in this action.
Background Libraries	Pre-recorded collections of background music, from which users of such music can select the compositions they need. (See, *e.g.*, Tr. 1869)

Background Music	Music used as background to the action on the screen; a recognizable composition suitable for feature use may be used as background, but background music is most often specially composed by writers hired for that purpose by the program producer; also called "incidental music". (See *e.g.*, Tr. 2491, 2494-95, 3447-50)
Barton Music Corp.	Music publisher which directly licensed 3M. (See AX 195)
Below the Line	As used in the TV industry, the equipment elements of program production such as cameras, production facilities, etc., as opposed to performers, directors, producers, and other creative elements. (See, *e.g.*, Tr. 66) See "Above the Line."
Berlin, Irving	Composer, Executive Officer of Irving Berlin Music Co., *q.v.* (See, *e.g.*, Tr. 1408-09)
Berman, Albert	Managing Director, Harry Fox Agency, *q.v.* (See, *e.g.*, Tr. 771-72) Witness at trial.
Big Three	Trade name for the music publishing firm of Robbins, Feist & Miller, *q.v.* (See, *e.g.*, Tr. 1400-02)
Blackwood Music, Inc.	Music publisher; CBS subsidiary; BMI affiliate. (See, *e.g.*, Tr. 1799-1800, 1826)
BMI	Broadcast Music, Inc., performing rights licensing organization formed in 1939. A defendant in this action.
Bob Banner Associates	Initial co-producer of "The Carol Burnett Show". (See, *e.g.*, Tr. 487)
Booking	The process of engaging a guest performer to appear on a television show. (See, *e.g.*, Tr. 3267)
Bourne Co.	Music publisher which directly licensed 3M. (See 3MPX56)
Brackman, Al	General Manager of The Richmond Organization (TRO), *q.v.*; member of NMPA Board of Directors. (See, *e.g.*, PX251 (Brackman Dep.) 3, 8) Portions of deposition in evidence.
Brandon Music Company	Music publisher which directly licensed 3M. (See AX197)

Bregman, Jack	Former executive of Bregman, Vocco & Conn. *q.v.* (See, *e.g.*, Tr. 1407)
Bregman, Vocco & Conn	Music publisher which did not directly license 3M. (See, *e.g.*, Tr. 1407-08)
Brettler, Leon	Executive Vice President of Shapiro, Bernstein Publishing Company, *q.v.*; member of the Boards of ASCAP, NMPA and Harry Fox Agency. (See, *e.g.*, PX252 (Brettler Dep.) 2-4) Portions of deposition in evidence.
Brody, Bernard	An agent used by some network television producers to secure TV synchronization rights. (See, *e.g.*, Tr. 424-27)
Broido, Arnold	President of the Theodore Presser Company, *q.v.*; member of ASCAP Board of Directors; President of NMPA. (See Tr. 3488-92) Witness at trial.
Burkhardt, Francis B.	BMI employee. (See PX253 (Burkhardt Dep.) 3) Portions of deposition in evidence.
Burnett, Carol	Variety performer, star of CTN's "The Carol Burnett Show". (See, *e.g.*, Tr. 401)
Burngood	Music publisher owned by Carol Burnett, et al. Publishes music specially written for CTN's "The Carol Burnett Show". (See Tr. 489-90)
By-pass	As used in this action, the acquisition of performance rights directly from copyright owners.
Carol Burnett Show, The	One of only two (the other being the Sonny and Cher Comedy Hour, *q.v.*) musical variety programs regularly presented on CTN for the 1973-74 season; the only such program presently scheduled for the 1974-75 season. (See, *e.g.*, Tr. 3238; Broadcasting, April 15, 1974, p. 62)
CBS, Inc.	The Columbia Broadcasting System, which includes: CBS Television Network: 190 independently owned stations and five CBS owned and operated stations in New York, Chicago, Philadelphia, St. Louis and Los Angeles; the world's largest advertising medium. (See Tr. 4615-17)

	CBS Radio Division: Fourteen owned and operated stations in New York, Chicago, Philadelphia, St. Louis, Los Angeles, San Francisco and Boston; WCBS-FM (N. Y.) attained the largest audience level of any FM station in the U. S. (See Tr. 4615-17)
	CBS Records: The world's largest manufacturer and seller of records and tapes. (See Tr. 4615-17)
	CBS Radio Network.
	April Music, Blackwood Music and two other music publishers.
	Several other businesses.
Chappell & Co., Inc.	Music publisher which negotiated with 3M in 1964 and 1968 for the M-700 series, but reached no agreement. (See, *e.g.*, Tr. 1325-26) A defendant in this action.
Chappell & Co., Ltd.	English music publisher under common ownership with Chappell & Co., Inc. (See, *e.g.*, Tr. 1325-26) See also Ricketts, M.E.
The Charts	A list of record sales of current songs in order of popularity for a given week. Each of the trade publications, such as Cash Box, Record World and Billboard, publishes its own charts. (See, *e.g.*, Tr. 596-97)
Chiantia, Salvatore	President of the Music Division of MCA, *q.v.*; corporate Vice President of MCA, Inc.; Vice President of ASCAP; President of NMPA. (See, *e.g.*, Tr. 2856-57, 2875-76, 2880-81) Witness at trial; portions of deposition in evidence.
Chieman, Cyd	Treasurer of Frank Music Co., *q.v.* (See Tr. 1424-25)
Chippendale Music Co.	Music publisher which directly licensed 3M. (See AX198)
CLGA	Composers and Lyricists Guild of America, *q.v.* (See, *e.g.*, Tr. 3446)
Coleman, Cy	Composer and publisher; member of ASCAP Board of Directors, member of CLGA. (See, *e.g.*, PX 255 (Coleman Dep.) 2-6) A defendant in this action; portions of deposition in evidence.

Collins, J. M.	Sales Manager of ASCAP. (See Tr. 1295-96)
Commercials in the Can	Television commercials produced by advertising agencies which have already been filmed or taped. (See, *e.g.*, Tr. 1868) See also "Music in the Can".
Composers and Lyricists Guild of America (CLGA)	Organization representing writers of theme and background music working for Hollywood studios. (See, *e.g.*, Tr. 3446)
Compton Music Corp.	Music publisher which directly licensed 3M. (See AX199)
Compulsory license	See "Mechanical Right".
Consolidated Music Publishers, Inc.	Music publisher which directly licensed 3M. (See AX201)
Copland, Aaron	Dean of American composers, conductor, lecturer, author; member of ASCAP Board of Directors. (See Tr. 3478-84) Witness at trial.
Cramer, Edward	President and Chief Executive Officer of BMI. (See, *e.g.*, Tr. 4244) Witness at trial.
Criterion Music Corp.	Music publisher which directly licensed 3M. (See AX202)
CTN	The CBS Television Network: 190 independently owned stations and 5 CBS owned and operated stations (WCBS-TV, New York; WBBM-TV, Chicago; WCAU-TV, Philadelphia; KMOX-TV, St. Louis; KNT-TV, Los Angeles); the world's largest advertising medium. (See Tr. 4615-17)
Dann, Michael	Former senior Vice President of CBS (1966-1970), responsible for planning, development and scheduling of all CTN programs except news. (See, *e.g.*, Tr. 3214-16) Witness at trial.
Deal Memo	An informal memorandum of agreement used in the television industry between network and producer. Formal agreements are frequently dispensed with. (See, *e.g.*, Tr. 577-78)
Dean, Walter	Executive Vice President of CBS Records; Vice President of April Music and Blackwood Music. (See, *e.g.*, Tr. 1799) Witness at trial.

Demos	Demonstration recordings. Specially made recordings used by publishers to promote new works in their catalogs; such recordings will often be sent to producers and leading performers in an attempt to promote use of new works. (See, *e.g.*, Tr. 3085)
Direct licensing	Licensing of public performance rights from the copyright proprietor, as distinguished from licensing such rights through a performing rights organization such as BMI, ASCAP or SESAC.
Dorsey Bros. Music, Inc.	Music publisher which directly licensed 3M. (See 3MPX24)
Edwin H. Morris Co.	Music publisher which did not directly license 3M under the misapprehension that the amount of money involved was small. (See, *e.g.*, PX263 (Morris Dep.) 129-31) A defendant in this action. See Morris, Edwin H.
Evans, Robert	Vice President and General Counsel of CBS. (See, *e.g.*, AX319 (Evans Dep.) 4) Portions of deposition in evidence.
Fagan, Paul	ASCAP employee. (See, *e.g.*, PX256 (Fagan Dep.) 2) Portions of deposition in evidence.
Fair use	The doctrine that copyrighted works may be used without the copyright proprietor's permission when the use is related to criticism or review, generally for scholarly, scientific and informative purposes.
Famous Music Corp.	Music publisher which negotiated with 3M but failed to reach agreement. Later reopened negotiations and reached tentative agreement from which 3M backed off. Owned by Paramount, *q.v.* (See, *e.g.*, Tr. 1377-79, 1389, 1982-87, PX259 (Herman Dep.) 145-46) A defendant in this action. See Herman, Sidney.
Feature Music	Music which is the principal focus of audience attention, *e.g.*, a song sung by a performer on-camera. (See, *e.g.*, PX469)

Finell, Alan	Employee of the Harry Fox Agency, specializing in clearance of television synchronization rights. (See, *e.g.*, Tr. 816-17)
Finkelstein, Herman	Former General Counsel of ASCAP. (See, *e.g.*, Tr. 3577) Witness at trial; portions of deposition in evidence.
Fisher, Franklin	Professor of Economics at MIT. (See Tr. 1636) Witness at trial.
Four Fund System	One of the methods used by ASCAP to distribute performance royalties to writers of music, so-called because the total sum available for distribution is divided into four funds, each of which uses a different basis for calculating payments. (See, *e.g.*, Tr. 2512)
Four Jays Music, Inc.	Music publisher which directly licensed 3M. (See AX 203)
Fox, Frederick	President, Sam Fox Publishing Co., *q.v.* (See AX 204)
Frank Music Corp.	Music publisher which directly licensed 3M. (See, *e.g.*, Tr. 1992) See Loesser, Frank.
Gentry, Bobbie	Typical of the new breed of singers who write much of the music they perform. (See Vincent Tr. 624)
Gerson, Harry	Controller, Edwin H. Morris Co., *q.v.* (See Tr. 1393-94)
Goodman, Eugene	Part-owner and chief executive of Jewel Music, *q.v.* (See, *e.g.*, Tr. 1537-38) Witness at trial. Portions of deposition in evidence for limited purpose only.
Grand Right	The right to make a dramatic performance of a copyrighted work. Such rights are not licensed through BMI or ASCAP. (See 17 U.S.C. Sec. 1(c)).
Green, John	Composer, conductor; ASCAP member. (See Tr. 3441-46) Witness at trial.
Guttenberg, Helmut	BMI employee. (See PX258 (Guttenberg Dep.) 3-4) Portions of deposition in evidence.

Hamilton, Joe	Executive Producer of "The Carol Burnett Show"; husband of Carol Burnett. (See, *e.g.*, Tr. 488)
Happy Birthday to You	A song whose owner charges an unusually high fee for a synchronization rights license. (See, *e.g.*, Tr. 427-28)
Harry Fox Agency	A non-profit corporation, owned by the NMPA, which represents music publishers in the licensing of synchronization, motion picture performance and mechanical reproduction rights. (See, *e.g.*, Tr. 772, 775)
Herman, Sidney	Vice President of Famous Music, *q.v.* (See, *e.g.*, Tr. 1378-79) Portions of deposition in evidence.
Herzog, R. H.	Corporate Vice President of the Minnesota Mining and Manufacturing Company, *q.v.* (See Tr. 1294)
Hillside Publications Ltd.	Music publisher which directly licensed 3M. (See AX221)
Hi-Ti Music Corp.	Music publisher which directly licensed 3M. (See AX222)
Holloway Music Publishers, Inc.	Music publisher which directly licensed 3M. (See AX205)
In the Can	See "Commercials in the Can", "Music in the Can".
International Korwin Corp.	Music publisher which directly licensed 3M. (See AX208)
Irving Berlin Music Co.	Music publisher which negotiated with 3M but failed to reach an agreement. Later reopened negotiations but was unable to reach an agreement because 3M expected to receive an ASCAP license. (See, *e.g.*, Tr. 1410-11, 1987-88)
Israel, Arthur	President of Famous Music, *q.v.* (See Tr. 1379-80)
Jackson, Theodore	Attorney for Irving Berlin Music Co.; involved in negotiations with 3M. (See Tr. 1408-09)
Jencks, Richard W.	Vice President of CBS, Washington; President of the CBS Broadcasting Group; member of CBS Board of Directors. (See, *e.g.*, AX320 (Jencks Dep.) 4-7) Portions of deposition in evidence.

Jewel Music Co.	Music publisher which directly licensed 3M. (See, *e.g.*, AX206) See Goodman, Eugene.
JoCar	Music publisher owned by Carol Burnett, et al., which publishes music specially written for CTN's "The Carol Burnett Show". (See, Tr. 489-90)
Joel Dean Associates, Inc.	Firm of consulting economists; in 1956 designed the ASCAP performance survey used in making distributions to members. (See Tr. 2450-54)
Joy Music, Inc.	Music publisher which directly licensed 3M. (See AX207)
J. Walter Thompson (JWT)	Advertising agency; produces more than 1300 television commercials a year, most of the music in which is specially composed. (See, *e.g.*, Tr. 1866, 1868)
JWT Music, Inc.	Music publisher, formed in 1969 as a subsidiary of J. Walter Thompson, *q.v.* The only advertising agency music publisher. (See, *e.g.*, Tr. 1877-78, 2531)
K-91	*K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U. S. 1045 (1968). Antitrust action against ASCAP and its members brought by broadcasters, in which the Ninth Circuit ruled in favor of ASCAP.
Kaplan, Irwin	Vice President of Programming Methods, Inc. ("PMI"). (See Tr. 2275) Witness at trial.
Kellman, Leon	Former counsel for AGAC. (See, *e.g.*, Tr. 1604) Witness at trial.
Korman, Bernard	General Counsel of ASCAP; formerly Assistant General Counsel.
Kramer, Milton	Vice President and General Manager of Frank Music Corp., *q.v.* (See, *e.g.*, Tr. 1424)
Lane, Burton	Composer; AGAC member (council member, 1955-present; President 1957-67). (See, *e.g.*, Tr. 990-93) Witness at trial.
Laurel Music Corp.	Music publisher which directly licensed 3M. (See AX219)

Lead Sheets	Informal musical arrangements of songs used on a musical variety program. The final orchestration is prepared from the lead sheet. (See, *e.g.*, Tr. 588-90)
Lee, George	Officer of Music Publishers Holding Co., *q.v.* (See Tr. 1413)
Leeds Music Corporation	Music publisher which directly licensed 3M. Acquired by MCA, *q.v.* (See, *e.g.*, AX209, Tr. 1364)
Levinton, Carl	Controller of ASCAP. (See Tr. 2443)
Lindgren, R. E.	Project manager of the 3M background music division. (See, *e.g.* Tr. 1285)
Loesser, Frank	Composer; President of Frank Music, *q.v.* (See, *e.g.*, Tr. 1425)
M-700	A Minnesota Mining and Manufacturing Company ("3M") background music project involving the sale of tapes for which performance licenses for ASCAP music were acquired directly from copyright owners. (See, *e.g.*, Tr. 1257-59, 1977)
M-1200	A 3M background music project in which tapes were leased rather than sold and for which performance licenses were obtained from ASCAP. (See, *e.g.*, 3MPX86, Tr. 1479-81).
Marks, Paul	Director of ASCAP operations. (See, *e.g.*, Tr. 2400) Witness at trial; portions of deposition in evidence.
Maxin, Arnold	Former Executive Vice President of Robbins, Feist & Miller, *q.v.* (See, *e.g.*, Tr. 1401, 1933)
MCA	Music Corporation of America. Entertainment conglomerate; acquired music publisher Leeds Music, which was then negotiating a direct license with 3M. Large producer of films and television programs through its subsidiary, Universal. (See, *e.g.*, Tr. 1364-67) See Chiantia, Salvatore.
McLaughlin, John J.	ASCAP employee. (See PX261 (McLaughlin Dep.) 2-3) Portions of depositions in evidence.

Mechanical Right ("Mechanicals")	Under the Copyright Act, the right to reproduce a composition mechanically (*i.e.*, on phonograph records or tapes). After the initial recording, the copyright proprietor is obliged to grant such rights at the statutory rate of 2¢ per copy. (See, *e.g.*, 17 U.S.C. § 1 (e), Tr. 775)
Metromedia	TV film producing company; owner of defendant Sunbeam Music.
Milene Music	Music publisher which directly licensed 3M. (See AX223) A defendant in this action.
Mills Music, Inc.	Music publisher which directly licensed 3M. (See AX210)
Mingle, Marion B.	Handles motion picture synchronization and performance rights for the Harry Fox Agency (1944-present). (See, *e.g.*, Tr. 852-53) Witness at trial.
Minnesota Mining and Manufacturing Company (3M)	A company which obtained direct licenses for music included in it's background music tapes. (See, *e.g.*, Tr. 1977)
Morris, Edwin H. ("Buddy")	President, Edwin H. Morris Co., *q.v.*; member of ASCAP Board of Directors. (See, *e.g.*, PX263 (Morris Dep) 3, 8-9) Portions of deposition in evidence.
MPA	Music Publishers Association, *q.v.* (See, *e.g.*, Tr. 3491)
MPHC	Music Publishers Holding Company, *q.v.* (See, *e.g.*, Tr. 1412-16, 1418-19)
MPPA	Music Publishers Protective Association, *q.v.* (See, *e.g.*, Tr. 772) Former name of NMPA, *q.v.*
Music in the Can	Music that has been recorded on tape or film, for TV programs or motion pictures. (See, *e.g.*, Tr. 49-50) See also "Commercials in the can."
Music Publishers Association (MPA)	Trade association representing serious and educational music publishers. (See, *e.g.*, Tr. 3491)

Music Publishers Holding Co. (MPHC)	Music publisher which negotiated with 3M but reached no agreement due to the illness and death of the corporate officer in charge of the matter; later reopened negotiations but 3M declined to go through with the oral agreement that had been reached. (See, *e.g.*, Tr. 1412-16, 1418-19)
Music Publishers Protective Association (MPPA)	The original name of the National Music Publishers Association (NMPA), *q.v.* (See, *e.g.*, Tr. 772)
Music Sales Corp.	Music publisher which directly licensed 3M. (See AX201) See Wise, Herbert H.
Muzak	Manufacturer and distributor of background music systems. (See, *e.g.*, Tr. 841)
Nathan, Robert N.	Consulting economist. (See Tr. 3842) Witness at trial.
National Music Publishers Association (NMPA)	Trade association of 68 music publishers, which represents the interests of publishers. Owns the Harry Fox Agency. Originally the Music Publishers Protective Association (MPPA). (See, *e.g.*, Tr. 772)
Needle Drop	Pre-recorded stock music, as on a phonograph record, used as background music. (See, *e.g.*, Tr. 1869)
NMPA	National Music Publishers Association, *q.v.* (See, *e.g.*, Tr. 772)
Nucleus	See "Reservoir".
Paley, William S.	Chairman of the Board and chief executive officer of CBS. (See, *e.g.*, AX321 (Paley Dep.) 3-4) Portions of deposition in evidence.
Paramount	TV film and movie producing company; owner of defendant Famous Music Corp, *q.v.* (See, *e.g.*, Tr. 18, PX259 (Herman Dep.) 14-16)
P.D.	See "Public Domain, Music in the".
Performed Works Index	List of ASCAP works which have appeared in ASCAP surveys of broadcast performances. (See, *e.g.*, Tr. 2431-32)

Per Program License	Public performance rights licenses offered by BMI and ASCAP under which a fee is paid by the broadcaster user only for those programs which use music from the repertory of the licensing organization. BMI and ASCAP are required by consent decrees to offer per program licenses. (See, *e.g.*, BX 114, CX 2, Ex. 16)
Pic Corporation	Music publisher which directly licensed 3M. (See AX211)
Pickwick Music Corp.	Music publisher which directly licensed 3M. (See AX209)
Pilot	A single episode of a television program prepared as a sample of a proposed continuing series. (See, *e.g.*, Tr. 3225)
Poklitar, Emil D.	CTN employee, supervising the music clearance section. (See, *e.g.*, Tr. 2045) Witness at trial; portions of depositions in evidence.
Policing	Surveying music users—*e.g.*, broadcasters, commercial establishments—to ascertain whether or not they are making unlicensed performances of musical compositions. (See, *e.g.*, Tr. 3785-86)
Precht, Robert H.	Producer of CTN's former Ed Sullivan Show. (See, *e.g.*, Tr. 319)
Preston, Marion	Vice President of J. Walter Thompson Company, *q.v.* (See, Tr. 1866-67) Witness at trial.
Programming Methods, Inc. (PMI)	See Kaplan, Irwin.
Public Performance Right	The right to perform a copyrighted composition publicly for profit. Such rights can be licensed either from a licensing organization (BMI, ASCAP or SESAC) or from the copyright proprietor. (See, *e.g.*, 17 U.S.C. Sec. 1 (e))
Punkin Productions	Producer of "The Carol Burnett Show", owned by Carol Burnett and Joe Hamilton. (See, *e.g.*, Tr. 457-88)
Ray Music Company	Music publisher which directly licensed 3M. (See AX212)

Reimer, Richard	Attorney employed by ASCAP.
Reservoir	As used in this case with respect to CBS' proposed per-use system, that body of compositions in the BMI and ASCAP repertories which are to be accessible to CBS at fixed use rates. Also known as the nucleus. (See, *e.g.*, PX 881)
Residuals	Fees paid to actors, special music writers, etc., when a television program is rerun. (See, *e.g.*, Tr. 661-62)
Richmond, Howard	President of The Richmond Organization, *q.v.* (See, *e.g.*, Tr. 1420)
The Richmond Organization (TRO)	Music publisher which negotiated with 3M in 1965 and 1966 and failed to reach an agreement. (See, *e.g.*, Tr. 1419-23, 1990)
Ricketts, M. E. ("Bill")	Managing Director of Chappell & Co., Ltd., *q.v.* (See, *e.g.*, Tr. 1325)
Robbins, Feist & Miller	Music publisher, also known as the Big Three, which negotiated with 3M but failed to reach agreement; owner of defendant Robbins Music. (See Tr. 1400-02)
Robbins Music	Music publisher; part of Robbins, Feist & Miller, *q.v.* A defendant in this action.
Rosenthal, Paul	Manager of the Logging and Clearance Department at BMI. Witness at trial. (See Tr. 4358)
Ross Jungnickel Music, Inc.	Music publisher which directly licensed 3M. (See AX213)
St. Nicholas Music, Inc.	Music publisher which directly licensed 3M. (See AX214)
Sam Fox Publishing Co.	Music publisher which directly licensed 3M. (See AX215)
Scale	The minimum payment to performing artists permitted by union contract. (See, *e.g.*, Tr. 4765)
Scott, Ed	Special music writer for the "Jim Nabors Hour". (See Tr. 601-02)

Screen Gems	TV film and movie producing company; owner of defendant Screen Gems-Columbia Music, Inc., *q.v.* (See, *e.g.*, AX264)
Screen Gems-Columbia Music, Inc.	Music publisher owned by Screen Gems, *q.v.* A defendant in this action.
Seeburg	Manufacturer and distributor of background music systems. (See Tr. 841)
Segelstein, Irwin	Former Vice President, Program Administration, CTN. (See Tr. 2009-10) Witness at trial.
Sekerak, Art	CBS business affairs negotiator for programs including football half-time shows. (See Tr. 360)
SESAC	A performing rights organization licensing a considerably smaller number of compositions than ASCAP and BMI. (See, *e.g.*, Tr. 2531)
Shafer, Mark E.	Former BMI employee. (See PX264 (Shafer Dep.) 3) Portions of deposition in evidence.
Shapiro Bernstein Publishing Co.	Music publisher which directly licensed 3M. (See, *e.g.*, AX217) See Brettler, Leon.
Shenandoah	*United States* v. *ASCAP (Shenandoah Valley Broadcasting, Inc.)*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964). Application by broadcasters under the ASCAP consent decree seeking ASCAP licenses requiring program producers to clear public performance rights at the source. The Second Circuit affirmed Judge Ryan's decision that ASCAP was not required to grant such licenses under its consent decree.
Shulman, Alan	Vice President, Belwin Mills Publishing Corp.; member of NMPA Board of Directors. Formerly business manager and house counsel, The Richmond Organization, *q.v.* (See, *e.g.*, Tr. 3065, 3088-89) Witness at trial.
Silverman, Fred	Vice President, programming, CTN (See Tr. 4733-34) Witness at trial
Sipes, Donald	Formerly Vice President, business affairs and planning, CTN. (See, *e.g.*, Tr. 14) Witness at trial; portions of deposition in evidence.

Solfeggist	One skilled in the art of solfeggio, *i.e.*, able to listen to music and reproduce it in notational form. ASCAP employs solfeggists in its music monitoring operations to identify music. (See, *e.g.*, Tr. 2464)
Songwriters Protective Association (SPA)	The original name of the American Guild of Authors and Composers (AGAC), *q.v.* (See, *e.g.*, Tr. 992)
Sonny and Cher Comedy Hour	One of only two (the other being "The Carol Burnett Show") musical variety programs currently (1973-74) appearing on CTN; program has been cancelled for the 1974-75 season. (See, *e.g.*, Tr. 3238, Broadcasting, April 15, 1974, p. 62)
Southern Music Publishing Co., Inc.	Music publisher which directly licensed 3M. (See AX216)
Southworth, Raymond W.	Professor of Mathematics and Director of the Computer Center at the College of William and Mary. (See Tr. 1929) Witness at trial.
Special	A TV program not on the regular network schedule. (See, *e.g.*, Tr. 732-35)
Spontaneous Performances of Music	Ad-libbed performances of music, as when a performer appearing on a live show improvises new lyrics for copyrighted music.
Stanton, Frank	Former Vice Chairman of CBS. (See, *e.g.*, AX323 (Stanton Dep.) 5) Portions of deposition in evidence.
Starr, Herman	Former officer of the Music Publishers Holding Company. Deceased. (See, *e.g.*, Tr. 1414)
Steiner, Peter O.	Professor of Law and Economics at the University of Michigan and Chairman of the Department of Economics. (See Tr. 4378-81) Witness at trial.
Stern, Miriam	Former executive director of AGAC. (See, *e.g.*, Tr. 1038-39)
Stock Music	Pre-recorded music, used as background, available from background services or libraries. (See, *e.g.*, Tr. 1869-71)

Sunbeam Music	Music publisher, owned by Metromedia. A defendant in this action.
Sunga, George A.	Free lance TV producer. (See, *e.g.*, Tr. 731) Witness at trial.
Synchronization Right	The right to record music in synchronization with film or video tape, also known as "synch right". (See, *e.g.*, Tr. 2975-76)
Syndication	The licensing of television programs to local or foreign stations after their initial run on network television. (See, *e.g.*, Tr. 975)
Theme music	Music used to introduce and close a program. (See, *e.g.*, Tr. 212)
Theodore Presser Company	Serious and educational music publisher, owned by the Theodore Presser Foundation, which donates its profits to the support of music education. (See Tr. 3488-89)
3M	Minnesota Mining and Manufacturing Company, *q.v.*
Timberlake, E.C.	Counsel for Famous Music, *q.v.* (See, *e.g.*, Tr. 1378-79)
TRO	The Richmond Organization, *q.v.* (See, *e.g.*, Tr. 1419-23, 1990)
Tuna Fish Music, Inc.	Music publisher owned by CBS. (See Tr. 1838)
Unanticipated Uses of Music	Performances of music for which user has not had sufficient advance notice to obtain clearance; typically occur in live broadcasts of parades, sporting events, political conventions and similar events.
Unart	Music publisher; owned by United Artists, *q.v.* A defendant in this action.
United Artists	TV film and movie producing company; owner of defendant Unart, *q.v.* (See AX124)
Universal	TV production subsidiary of defendant MCA, *q.v.* (See, *e.g.*, Tr. 2057)
Valando Music Corp.	Music publisher which directly licensed 3M. (See AX219)

Vincent, Edward Duke	Former staff member of several network programs. (See, *e.g.*, Tr. 571-72) Witness at trial.
Vogel, Jerry	President of Jerry Vogel Music Co. (See, *e.g.*, Tr. 1905) Entire deposition in evidence.
Washington, Ned	Lyricist; member of ASCAP Board of Directors; member of AGAC. (See, *e.g.*, PX265 (Washington Dep.) 16, 92, 93) A defendant in this action; portions of deposition in evidence.
Wattenberg, Phillip	Member of the firm of Wattenberg & Wattenberg; counsel to Chappell & Co., Inc., *q.v.* (See PX266 (Wattenberg Dep.) 4) Portions of deposition in evidence.
Weissgold, Julian	BMI employee. (See, *e.g.*, PX267 (Weissgold Dep.) 3) Portions of deposition in evidence.
West Coast Committee of AGAC	A loosely knit, informal group of AGAC members, living on the West Coast. (See, *e.g.*, Tr. 1003-04) See American Guild of Authors and Composers.
Williams, Mary	An agent used by some network television producers to secure TV synchronization rights. (See *e.g.*, Tr. 747, 798-99)
Wise, Herbert H.	President of Music Sales Corp., *q.v.* (See AX201)
Wood, Robert D.	President of CTN. (See, *e.g.*, AX324 (Wood Dep.) 3-4) Portions of deposition in evidence.
Wright, Robert B.	Associate producer of "The Carol Burnett Show". (See, *e.g.*, Tr. 397-98) Witness at trial.
Zekley	*U.S.* v. *ASCAP (Application of Zekley)*, 442 F.2d 601 (2d Cir. 1971). Proceeding under the ASCAP consent decree to determine the proper distribution to ASCAP members of funds received by ASCAP from NBC and ABC as additional payments for music used on NBC and ABC television networks.

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS et al., Defendants.

No. 69 Civ. 5740.

United States District Court,
S. D. New York.
Sept. 22, 1975.

Television network brought antitrust action against licensing agencies for composers, writers and publishers and their members and affiliates, complaining that present system by which these agencies issued blanket licenses for right to perform any or all of the compositions in their repertories over the network in exchange for a flat annual fee violated Sherman Act, and seeking, inter alia, an injunction either enjoining these agencies from offering blanket licenses or, in alternative, and preferably, establishing a "per-use" system. The District Court, Lasker, J., held, inter alia, that network did not meet its burden of proving that defendants illegally restrained trade in market for performance rights for network television use and compelled it to take a blanket license as alleged in complaint, that network failed to prove that there were significant mechanical obstacles to direct licensing, that network failed to establish by credible evidence that copyright owners would refuse to deal directly with network if it called upon them to do so, and that claims of network could not be sustained.

Complaint dismissed.

1. Monopolies ⇐12(6), 24(15)

Licensing agencies for composers, writers and publishers were not illegal combinations merely because they offered blanket licenses to users of music, especially in view of consent decrees requiring the agencies to offer program licenses under which a fee was charged only with respect to programs in which a composition within repertory had been used and to structure fees for blanket and per program licenses so that user had a genuine choice between them, and in absence of any claim that agencies had violated any provision of consent decree. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

2. Monopolies ⇐17(1.3)

A combination of individual sellers offering entire pool of their products through a common sales agent at a negotiated package price is not per se illegal regardless of whether sellers are willing to sell their products on an individual basis. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. § 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

3. Monopolies ⇐12(5)

Critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

4. Monopolies ⇐24(7)

To secure injunctive relief in a private antitrust suit, the plaintiff must prove an actual violation of antitrust laws or that such violation is impending and that as a result the plaintiff is threatened with loss or injury. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

5. Monopolies ⇐24(12)

In action by television network against licensing agencies for composers, writers and publishers, in which network complained that present system by which these agencies issued blanket licenses for right to perform any or all of compositions in their repertories over network in exchange for a flat annual fee violated Sherman Act, network had burden of proving that direct licensing was not a feasible alternative to the blanket license. Sherman Anti-Trust

Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

6. Stipulations ⇐14(10)

Stipulation as to competitive disadvantage, executed prior to trial of action by television network against licensing agencies for composers, writers and publishers based on claim that present system by which these agencies issued blanket licenses for right to perform any or all of compositions in their repertories over network in exchange for a flat annual fee violated Sherman Act, was not subject to construction that these agencies had admitted unfeasibility of direct licensing. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

7. Monopolies ⇐24(9)

As a condition to television network's suit against licensing agencies for composers, writers and publishers, in which network complained that present system by which these agencies issued blanket licenses for right to perform any or all of compositions in their repertories over network in exchange for a flat annual fee violated Sherman Act and in which network sought an injunction either enjoining these agencies from offering blanket licenses or, in alternative, and preferably, establishing a "per-use" system, network was not required to have been unequivocally refused the kind of license it sought. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

8. Monopolies ⇐24(12, 13)

Absence of evidence that television network had made any effort to obtain a license requiring it to pay only for music it used did not establish that network was not compelled to take a blanket license, in case in which network complained that present system by which licensing agencies for composers, writers and publishers issued a blanket license for right to perform any or all of compositions in their repertories over the network in exchange for a flat annual fee violated Sherman Act, but would be regarded as highly relevant to that issue. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

9. Monopolies ⇐12(5)

Mere failure of licensing agencies for composers, writers and publishers to have created facilities or procedures for processing requests by music users for direct licenses for performance rights did not amount to an illegal refusal to deal, as claimed by television network, where the network had not, in many years it had held blanket licenses, indicated a wish to fill its music needs by means of direct licensing and there was no evidence of substance that before bringing suit against agencies network ever considered such an alternative in its own business planning. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

10. Monopolies ⇐12(5)

Antitrust laws did not require licensing agencies for composers, writers and publishers to maintain well-oiled machinery for direct licensing for benefit of television network. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

11. Monopolies ⇐24(7)

Television network, which complained that present system by which licensing agencies for composers, writers and publishers issued blanket licenses for right to perform any or all of compositions in their repertories over the network in exchange for a flat annual fee violated Sherman Act, and which sought an injunction either enjoining these agencies from offering blanket licenses or, in alternative, and preferably, establishing a "per-use" system, was not entitled to relief simply for purposes of insulating it from risk of competitive disadvantage vis-a-vis other networks if it made business decision to experiment with a new method of music licensing. Sherman Anti-Trust Act, §§ 1, 2, 15 U.

S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U. S.C.A. § 26.

12. Monopolies ⇐24(12)

Television network, which brought antitrust action against licensing agencies for composers, writers and publishers based on claim that present system by which these agencies issued blanket licenses for right to perform any or all of compositions in their repertories over network in exchange for a flat fee violated the Sherman Act, failed to meet its burden of proving that these agencies illegally restrained trade in market for performance rights for network television use and compelled it to take a blanket license. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

13. Monopolies ⇐24(13)

Television network, which brought antitrust action against licensing agencies for composers, writers and publishers based on claim that present system by which these agencies issued blanket licenses for right to perform any or all of compositions in their repertories over network in exchange for a flat fee violated the Sherman Act, failed to prove that there were significant mechanical obstacles to direct licensing. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

14. Monopolies ⇐24(13)

Television network, which brought antitrust action against licensing agencies for composers, writters and publishers based on claim that present system by which these agencies issued blanket license for right to perform any or all of compositions in their repertories over network in exchange for a flat fee violated the Sherman Act, failed to establish by credible evidence that copyright owners would refuse to deal directly with the network if it called upon them to do so; to the contrary, there was impressive proof that copyright proprietors would wait at network's door if it announced plans to drop its blanket license. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

15. Monopolies ⇐12(1)

It is proof of threat of actual anticompetitive conduct, not possible "disinclination," which violates antitrust laws. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

16. Monopolies ⇐12(5)

Failure of television network to prove that copyright proprietors would not compete with one another on a price basis if network sought direct licenses from them was fatal to network's claim that members and affiliates of licensing agencies for composers, writers and publishers had illegally combined to eliminate price competition among themselves. Sherman Anti-Trust Act §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

17. Monopolies ⇐24(13)

Television network's claim that members and affiliates of licensing agencies for composers, writers and publishers had combined to fix price at which network must license performance rights by licensing those rights only in a package could not be sustained, where network failed to prove either that it purchased blanket licenses under compulsion or that price it paid was fixed, and where, to contrary, record established that network had always negotiated price for its licenses with these agencies, and it was not established that copyright proprietors were unwilling to sell performance rights on a direct licensing basis at a negotiated price for each license. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

18. Monopolies ⇐12(5)

Television network's claim that licensing agencies for composers, writers and publishers had conditioned licensing to network of music that it wished to use upon licensing of music it did not wish to use was vitiated by absence of

proof that there were two separate and distinct groups of compositions, of which network wished to purchase only one, that network negotiated with these agencies to license only "wanted" compositions, and that these agencies refused to negotiate on that basis and had to coerce network to license "unwanted" compositions as a condition of licensing "wanted" compositions. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

19. Monopolies ⇐12(5)

Television network's claim that members and affiliates of licensing agencies for composers, writers and publishers were guilty of a group boycott by forming music pools and authorizing their licensing agents to license only on terms that foreclosed network from dealing directly with copyright owners could not be sustained, where network failed to prove that licensing authority of these agencies was limited to such terms, was exclusive in fact, or that copyright owners had refused or would refuse to deal with network directly on an individual basis. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

20. Monopolies ⇐12(5)

Television network's claim that members and affiliates of licensing agencies for composers, writers and publishers were guilty of copyright misuse could not be sustained in absence of showing that such members or affiliates had refused or would refuse to license their compositions on a direct licensing basis, or otherwise used their collective leverage to compel network to license rights to music which it did not wish to license. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

21. Monopolies ⇐29

Offense of monopolization consists of two elements: possession of monopoly power in relevant market and willful acquisition or maintenance of that power as distinct from growth as a consequence of a superior product or historical accident. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

22. Monopolies ⇐12(1.3)

Attempted monopolization is established by a showing of specific intent to monopolize with a dangerous probability of succeeding. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

23. Monopolies ⇐12(1.3)

In context of antitrust action by television network against licensing agencies for composers, writers and publishers based on claim that present system by which these agencies issued blanket licenses for right to perform any or all of compositions in their repertories over the network in exchange for a flat annual fee violated Sherman Act, relevant market was not the market for these agencies' blanket licenses, but rather it was market for performance rights to compositions suitable for television network use. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

24. Monopolies ⇐12(1.3)

Test for determining relevant market in suits brought under section 2 of Sherman Act is whether products are reasonably interchangeable by consumers for same purposes. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

25. Monopolies ⇐24(13)

Television network failed to prove that licensing agencies for composers, writers and publishers possessed or had attempted to achieve monopoly power in the market for performance rights for network use. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 16, 15 U.S.C.A. § 26.

Cravath, Swaine & Moore, New York City, for plaintiff; Alan J. Hruska, Robert K. Baker, J. Barclay Collins, II, Robert M. Sondak, Kenneth M. Kramer, New York City, of counsel.

Paul, Weiss, Rifkind, Wharton & Garrison, New York City and Bernard Korman, New York City, for ASCAP; Herman Finkelstein, Jay H. Topkis, Allan Blumstein, Max Gitter, Richard Reimer, New York City, of counsel.

Hughes, Hubbard & Reed, New York City, for Broadcast Music, In ; Amalya L. Kearse, George A. Davidson, New York City, of counsel.

Stroock & Stroock & Lavan, New York City, for Warner Bros. Inc.

Simpson, Thacher & Bartlett, New York City, for MCA, Inc. and Duchess Music Corp.

Linden & Deutsch, New York City, for G. Schirmer, Inc. and Associated Music Publishers, Inc.

Hofheimer, Gartlir, Gottlieb & Gross, New York City, for Essex Music, Inc. and Hollis Music, Inc.

LASKER, District Judge.

In this age of change the quality of life has been fundamentally altered and influenced by the development of the automobile, the computer and television.

Millions of viewers spend untold hours weekly viewing television. During the larger part of that time the viewer is a listener to programs which utilize music, whether as background, as theme or as a feature. This case relates to the method by which networks are licensed to use copyrighted music on television.

The Columbia Broadcasting System (CBS) [1] brings this antitrust action against the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and their members and affiliates.[2] It complains that the present system by which ASCAP and BMI issue blanket licenses for the right to perform any or all of the compositions in their repertories over the CBS network in exchange for a flat annual fee violates the Sherman Act, 15 U.S.C. §§ 1 and 2. The complaint seeks an injunction under § 16 of the Clayton Act, 15 U.S.C. § 26, directing ASCAP and BMI to offer CBS performance right licenses on terms which reflect the nature and amount of CBS' actual use of music, or in the alternative, enjoining them from offering blanket licenses to any television network. CBS also seeks a declaration of copyright misuse under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.

I.

Introduction

A. The Parties

Prior to ASCAP's formation in 1914 there was no effective method by which composers and publishers of music could secure payment for the performance for profit of their copyrighted works. The users of music, such as theaters, dance halls and bars, were so numerous and widespread, and each performance so fleeting an occurrence, that no individual copyright owner could negotiate licenses with users of his music, or detect unauthorized uses. On the other side of the coin, those who wished to perform compositions without infringing the copyright were, as a practical matter, unable to obtain licenses from the owners of the works they wished to perform. ASCAP was organized as a "clearinghouse" for copyright owners and users to solve these problems. The world of music has changed radically since 1914. Radio and television broadcasters are the largest users of music today; they "perform" copyrighted music before audiences of millions. In 1975 ASCAP

1. CBS is engaged in a number of businesses, only one of which is the operation of the CBS television network (CTN). Although the parties distinguish between CBS and CTN in their post-trial submissions, for the sake of clarity we refer throughout this opinion to both the parent corporation and the network as "CBS."

2. The other named defendants are certain members of ASCAP, as representative of the class of ASCAP's members; and certain BMI affiliates, as representative of the class of BMI affiliates. The case has heretofore been declared a class action against both classes.

and BMI licensed these large users, including CBS and the other networks as well as smaller ones such as concert halls and background music services.

Because of the multitude of performances of music they generate each year, virtually all radio stations and television networks secure the rights to perform the music they use by a "blanket" license. An ASCAP blanket license gives the user the right to perform all of the compositions owned by its members as often as the user desires for a stated term, usually a year. Convenience is the prime virtue of the blanket license: it provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary to perform the copyrighted music used on radio stations and television networks in the course of a year. Moreover, it gives the user unlimited flexibility in planning programs, because any music it chooses is "automatically" covered by the blanket license.

ASCAP's current membership includes some 6,000 music publishing companies and 16,000 composers. Its members have granted ASCAP, as their licensing agent, the nonexclusive right to license users to perform the compositions owned by them. ASCAP provides its members with a wide range of services. It maintains a surveillance system of radio and television broadcasts to detect unlicensed uses, institutes infringement actions, collects revenues from licensees and distributes royalties to copyright owners in accordance with a schedule which reflects the nature and amount of the use of their music and other factors.

BMI, a non-profit corporation, was organized in 1939 by members of the radio broadcasting industry, including CBS. It is affiliated with approximately 10,000 publishing companies and 20,000 writers and functions in essentially the same manner as ASCAP. Although CBS sold back its BMI stock to the corporation in 1959, BMI is still owned entirely by broadcasters.

As a practical matter virtually every domestic copyrighted composition is in the repertory of either ASCAP, which has over three million compositions in its pool, or BMI, which has over one million. Like ASCAP, BMI offers blanket licenses to broadcasters for unlimited use of the music owned by its "affiliates." Almost all broadcasters hold blanket licenses from both ASCAP and BMI.

As is generally known, CBS operates one of three national television networks, as well as AM and FM radio stations in seven major cities. It has held blanket licenses from ASCAP for its radio broadcast operations since 1928, and from BMI since soon after that organization was founded in 1939. It has held ASCAP and BMI blanket licenses for its television network on a continuous basis since the late 1940's.

CBS supplies television programs to approximately two hundred affiliated television stations throughout the country, and telecasts about 7,500 programs per year. Many of these programs make use of copyrighted music which is recorded on the soundtrack. However, CBS does not produce most of the programs seen on its network. Instead it purchases the right to broadcast programs produced by independent television production companies, known as "program packagers." Most of the popular prime-time serials fall into this category. In addition CBS itself produces a television serial ("Gunsmoke"), two day-time serials, a number of "specials," usually variety shows, as well as news, public affairs and sports programs.

Agreements between program packagers and CBS normally stipulate the price at which the packager will produce a program in a series and furnish it to CBS for broadcast. Pursuant to the agreements, packagers are responsible for obtaining and furnishing to CBS most rights necessary for the use of

copyrighted music by the network, such as the right to record a copyrighted song in synchronization with the film or video tape ("synch" rights). However, program packagers do not, in the present scheme of things, furnish to CBS the right to *perform* the copyrighted music for profit as part of a television broadcast. Ever since television became commercially practicable in the late 1940's, CBS has obtained such "performance" rights for packaged programs, as well as for the programs it produces itself, from ASCAP and BMI by purchasing blanket licenses. From time to time it has renewed its licenses after negotiations with ASCAP and BMI. In the history of the parties the fee for the blanket license has been expressed in terms of a percentage of CBS' advertising revenues. For example for many years prior to the institution of suit, the BMI blanket license fee remained at 1.09% of net receipts from sponsors after certain deductions. This resulted in payment to BMI of about $16 million in 1969. For access to ASCAP's considerably larger repertory, CBS paid about $5.7 million in 1969. Averaging the total of $7.3 million paid by CBS in that year over 7,500 programs, its cost for ASCAP or BMI music runs about $1,000. per program. Of course, as detailed later, many of CBS' programs, such as news and public affairs shows, use no music at all; while others, such as variety shows, use a great deal. $1,000. is a small fraction of the total cost of the program. CBS pays about $200,000. for each episode of a one hour variety show or dramatic serial, and as much as $750,000. for a made-for-TV movie. Since the commencement of this action, CBS has held interim blanket licenses from ASCAP and BMI at a total annual cost of some $6 million.

B. The Consent Decrees

Neither ASCAP nor BMI is a stranger to antitrust litigation. In 1941 the Government sued ASCAP for antitrust violations. The action resulted in a consent decree which largely governs ASCAP's relationships with licensees such as CBS and other users. As amended in 1950, the decree requires ASCAP to offer a "per program" license to broadcasters in addition to the blanket license it has traditionally offered. Both forms of license grant the right to use any or all of the works in ASCAP's repertory. However, the blanket license allows use of the entire inventory for a designated period of time, usually a year, for which the user pays a flat fee, while the per program license permits use of the entire repertory but requires payment only with respect to programs which actually make use of copyrighted music. The 1950 decree mandatorily enjoins ASCAP to set its fees for these licenses in a manner which gives the user a genuine choice between them, and prohibits it from requiring or influencing the prospective licensee to negotiate for a blanket license before negotiating for a per program license.[3] If ASCAP and the li-

[3] The 1950 decree states in part that ASCAP is:

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the

censee are unable to agree on a fee, the latter may apply to the United States District Court for the Southern District of New York for determination of a "reasonable fee." In such proceedings, ASCAP bears the burden of establishing the reasonableness of the fee it requests.

Finally, ASCAP's licensing authority is not exclusive. The 1950 decree provides that music users may bypass ASCAP entirely, and negotiate for a license directly with the composer or publisher holding the copyright.[4]

Under the terms of a consent decree entered in 1966 in *United States v. BMI* (S.D.N.Y.), BMI is required to offer a per-program license in addition to a blanket license. The difference in the terms of these licenses must be justified by "applicable business factors."[5] Although the form of the BMI decree differs from that of the ASCAP decree, the

economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses:

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII. Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Sub-section (B) hereof, and to the final order or judgment entered by this Court in such proceeding . . .

4. The Decree provides:

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis:

(B) Limiting, restricting, or interfering with the right of any member to issue to a user nonexclusive licenses for rights of public performance:

5. The BMI consent decree provides in part:

(B) Defendant shall, upon the request of any unlicensed broadcaster, license the rights publicly to perform its repertory by broadcasting on either a per program or per programming period basis, at defendant's option. The fee for this license shall relate only to programs (including announcements), or to programming periods, during which a licensed composition is performed. The fee shall be expressed, at defendant's option, either (1) in dollars, (2) as a percentage of the revenue which the broadcaster received for the use of its broadcasting facilities or (3) in the case of sustaining programs or programming periods, as a percentage of the applicable card rate had the program or programming period been commercially sponsored. In the event defendant offers to license broadcasters on bases in addition to a per program or per programming period basis, defendant shall act in good faith so that there shall be a relationship between such per program or such per programming period basis and such other bases, justifiable by applicable business factors including availability, so that there will be no frustration of the purpose of this section to afford broadcasters alternative bases of license compensation.

have stipulated that CBS could ... direct licenses from BMI affili... with the same ease or difficulty, as ... may be, as from ASCAP mem... (CX 3)

... BS' Complaint

... does not allege that ASCAP and ... have violated the terms of the con... decrees. It claims, rather, that the ...ing alternatives which the decrees ... ly are not flexible enough to meet ...eeds, and are not realistically avail... to it. Thus, CBS' complaint ...ges that the blanket license "com... it to pay performance royalties ... respect to television programs ...ch use no music and that the per...gram license requires it to pay the ... royalty for a program which uses ...gle copyrighted composition as for ... which uses many. (Complaint ... 19). In other words, CBS asserts ... defendants are "using the leverage ...rent in [their] copyright pool to in... that plaintiff pay royalties on a ba... which does not bear any relationship ... amount of music performed." ...plaint ¶ 19) As to the third alter... specified in the consent decrees ... possibility of bypassing ASCAP ... BMI entirely and seeking licenses ... the specific compositions it wishes to ...m directly from the copyright pro...tors—CBS alleges that any attempt ... "to acquire such a large body of ... from the [individual copyright ...rietors] . . . would be wholly ...acticable . . . " (¶ 15)

...BS' disenchantment with the blanket ...ing system takes form in several ... claims: first, that the writer and ...her members of ASCAP and BMI ... combined through their common li... organizations to eliminate price ...petition among themselves and, by ... the grant of their respective li... through ASCAP and BMI, to fix ... price which a television network ... pay to secure the rights; second, ... ASCAP and BMI insist on granting ... blanket licenses and have therefore imposed an unlawful tie-in, in that CBS is required to purchase the rights to music it does not want to buy in order to secure the rights to music it does want; third, that by forming pools of music and requiring CBS to deal with the common licensing agent of the pools, the writer and publisher members and affiliates of ASCAP and BMI are engaging in a concerted refusal to deal directly with CBS; fourth, that through ASCAP and BMI the writers and publishers are guilty of monopolization, both attempted and achieved; and fifth, that the activities described constitute copyright misuse.

Despite this rather imposing line-up of charges, the central issue in the case is not complex. The essence of CBS' claim is that ASCAP and BMI are illegal combinations whose purpose and effect is to exact royalties from CBS for music it does not wish to license. The validity of the claim turns on whether CBS is in fact compelled to take a blanket license from the licensing organizations in order to secure the performance rights it needs. ASCAP and BMI contend that CBS is not compelled to do so, but has, in common with the ABC and NBC television networks and virtually all radio broadcasters, found it most convenient to license music by the blanket method. Defendants argue that if CBS no longer wishes to secure performance rights through centralized agents such as ASCAP and BMI, it can obtain the necessary rights directly from the individual members and affiliates of ASCAP and BMI by negotiating with them for performance rights to the particular compositions it wants. As defendants view the case, if CBS is to prevail it must prove that direct licensing with members of the alleged combination is an unfeasible alternative to the blanket license. Proof that licenses could not be obtained directly from copyright proprietors, despite the fact that ASCAP and BMI are required by consent decrees to permit their members and affiliates to license their compositions to users di-

rectly, would support the inference that defendants have formed illegal combinations in order to foreclose competition in the market for performance rights to music for network use. Conversely, proof that direct licensing is a feasible alternative method by which CBS could satisfy its music needs would undercut its claims that copyright proprietors have combined to monopolize the market for performance rights and have used their leverage to fix prices and impose unlawful tie-ins.

CBS vigorously disagrees with this view of the case. It argues, as though it could have moved for summary judgment years ago, that ASCAP and BMI are guilty of per se violations of the antitrust laws because the blanket licensing system, which is the only method by which CBS and the other networks have ever licensed performance rights, has "thoroughly eliminated" price competition among copyright owners as a matter of historical fact. (CBS Post-Trial Brief at 15) CBS views the question of the feasibility of direct licensing as irrelevant to the issue whether defendants have restrained trade. It argues that the sole questions to be determined are (1) whether defendants' restraint is justified or reasonable in view of the unique economic setting of the music licensing market; and (2) whether licensing can be accomplished on a more competitive basis. We find CBS' analysis unpersuasive. Nevertheless, we set forth our views on the questions CBS raises because of their central importance to the case. To do this, we must retrace some of the steps taken to define the issues prior to the trial.

II.

The Issue Presented for Decision

A. ASCAP's Motion for Summary Judgment

At an earlier stage in the litigation ASCAP moved for summary judgment, relying principally on the decision in *K–91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied* 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838 (1968). In *K–91* several members of ASCAP sued a radio broadcaster for infringement. The broadcaster admitted the infringement but defended on grounds similar to those asserted by CBS: that ASCAP is an unlawful combination engaged in price-fixing and block-booking of its members' compositions. In rejecting the claims, the Ninth Circuit observed that ASCAP does not fix prices because, under the 1950 consent decree, the United States District Court for the Southern District of New York is the ultimate price-fixing authority in the event of disagreement as to the reasonableness of ASCAP's fees. As to the other claims, the court observed:

> "No contention is made here that ASCAP's actual activities do not comply with the decree. In short, we think that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree.
>
> There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved [by the 1950 decree]." 372 F.2d at 4

Although we agreed with the [district] court, and continue to agree, that the activities of ASCAP and BMI are not illegal per se, we denied ASCAP's motion for summary judgment because of a critical difference between the case presented in *K–91* and the one at bar. In *K–91* the parties stipulated that it would be virtually impossible for broadcasters and copyright proprietors to arrange separate licenses and payments for each radio performance of a [work]

righted composition,[6] and no proposal was made to the court of a practicable alternative to blanket and per-program licenses. In contrast to *K–91*, CBS' claims are premised on the practicability of alternatives to the system now in effect. As noted earlier, CBS seeks an injunction either enjoining ASCAP and BMI even from offering blanket licenses or, in the alternative, and preferably, establishing what CBS calls a "per-use" system, by which ASCAP and BMI (rather than individual copyright owners) would be required to license individual compositions in accordance with a schedule of fees under court supervision.[7] Moreover, far from being a stipulated fact, the impracticability of CBS' "bypassing" ASCAP and BMI to secure licenses directly from copyright proprietors is the key factual issue in the case. Accordingly, we held that the feasibility of less restrictive alternatives to the blanket licensing system presented a genuine issue as to a material fact in the case and denied summary judgment to ASCAP.

Subsequent to determination of ASCAP's motion and in accordance with our holding, we ordered trial of the following specified issues:

"(i) Whether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint;

(ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anticompetitive means."

B. CBS' "Per Se" Contention

Despite our earlier holding that the activities of ASCAP and BMI are to be judged by the rule of reason and the

6. The United States adopted this position in its Memorandum of Amicus Curiae submitted in connection with the petition for writ of certiorari to the Supreme Court of the United States in *K–91*:

> . . . There are over 4,100 AM and 1,744 FM broadcasting stations located in every part of the United States (FCC Ann.Rep., pp. 106, 110 (1966)). Most of these stations broadcast recorded music for a substantial part of their operating day. They may acquire ownership of any recording they wish, and in the present state of technology there appears to be no effective means by which the enormous number of separate performances broadcast each year by commercial stations across the nation can be accounted for by copyright holders. Nor is it feasible for these stations to deal on a "per piece" basis with the thousands of individual copyright holders across the country in order lawfully to exploit recorded music, for the value of the right to broadcast a single performance of one recorded composition is far less than the cost of negotiating a separate license. It would appear, therefore, that there must be some form of centralized licensing system which serves the mutual interests of copyright holders and of music users, and which enables the marketing of performing rights for recorded music to be effectively accomplished. (Memorandum at 9–10)

7. Under the "per-use" system proposed by CBS, it would continue to license its music through ASCAP and BMI, but in a substantially different way than it does under the blanket license. CBS would pay ASCAP or BMI a specified fee for each performance of a composition in the pool (the "per-use reservoir"), plus an administrative fee. The fee for each use would be fixed in a schedule reflecting the nature of the use (theme, background or feature use) and other appropriate factors, such as duration of use, or the popularity of the composition. Thus, the fee schedule would likely provide different prices for otherwise comparable uses of particular compositions. If the fee schedule could not be fixed by agreement between CBS and defendants, it would be set by the court.

Each copyright proprietor would have the right to "withdraw" any of his works from the per-use reservoir on reasonable notice or at periodic intervals (e.g. quarterly). However, the right of withdrawal would not extend to spontaneous or other unplanned uses, nor to music which was filmed or taped prior to withdrawal even though the performance occurred after withdrawal. CBS and its producers would remain free to negotiate a license for a composition directly from the copyright proprietor regardless whether it is in the reservoir or has been withdrawn. The per-use rate schedule would be adjusted at periodic intervals to reflect prices negotiated in direct licensing transactions.

specification of the issues to be tried in light of that holding, CBS now takes the position that the primary question presented for determination is whether the present system can be amended to operate on a more competitive basis. As noted earlier, it argues as to the first issue, that it has established an illegal restraint of trade as a matter of law because the blanket licensing arrangement has "thoroughly eliminated" price competition among copyright owners as a matter of historical fact. (CBS Post-Trial Brief at 15) Coming after an eight week trial and the accumulation of a bulky factual record, the timing of this contention is unusual. For the reasons stated below, we find it to be unmeritorious as well.

[1, 2] In support of its contention that ASCAP and BMI are illegal combinations merely because they offer blanket licenses, CBS cites cases in which sellers agreed among themselves as to the prices to be charged buyers for their products. See, e. g., *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The cases are inapposite. Unlike the plaintiffs in the cited cases, CBS does not claim that the individual members and affiliates ("sellers") of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular "products" (compositions) offered by each of them. It makes the very different claim that a combination of individual sellers offering the entire pool of their products through a common sales agent at a negotiated package price is per se illegal, regardless whether the sellers are willing to sell their products on an individual basis.

[3] The claim fails as a matter of law. In *Automatic Radio Co., Inc. v. Hazeltine Research, Inc.*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950), the parties entered into an agreement by which Automatic Radio acquired a license for a ten year term to incorporate into its products any or all of several hundred patents held by Hazeltine. Automatic Radio was not obligated to use any of the patents in the manufacture of its products, but agreed in any event to pay Hazeltine royalties based on a percentage of its total sales. Automatic argued that the terms of the license constituted per se patent misuse and an illegal tying arrangement because the agreement exacted payment of a royalty on all sales whether or not its products used the patents, and in effect required it to purchase licenses for products for which it needed no license as well as for those which did. In rejecting the argument, the Court stated:

> "We cannot say that payment of royalties according to an agreed percentage of the licensee's sales is unreasonable. Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. We are not unmindful that convenience cannot justify an extension of the monopoly of the patent. But as we have already indicated, there is in this royalty provision no inherent extension of the monopoly of the patent. Petitioner cannot complain because it must pay royalties whether it uses Hazeltine patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them. If it chooses to use none of them, it has nevertheless contracted to pay for the privilege of using existing patents plus any developments resulting from respondent's continuous research. We hold that in licensing the use of patents to one engaged in a related enterprise, it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales." 339 U.S. at 834, 70 S.Ct. at 898 (citations omitted).

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) the Court refined the standards by which the validity of package licenses are to be judged. At issue in that case was the propriety of an injunction entered by the district court enjoining Hazeltine from:

> "A. Conditioning directly or indirectly the grant of a license to . . . [Zenith] . . . under any domestic patent upon the taking of a license under any other patent *or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent.*" 395 U.S. at 133–34, 89 S.Ct. at 1582 (emphasis in original)

The quoted provision was directed at Hazeltine's proven policy of *insisting* upon acceptance of its standard five-year package license agreement covering some 500 patents, and reserving royalties based on Zenith's total radio and television sales whether or not the licensed patents were actually used in the products manufactured. The Court of Appeals had stricken the last clause of the quoted paragraph, relying on *Automatic Radio* for the proposition that conditioning the license upon payment of royalties on unpatented products was not misuse of the patent. The Supreme Court disapproved this construction of its earlier decision. It distinguished between the situation presented in *Automatic Radio*, in which the parties *agreed* on a package license "as a convenient method designed by the parties to avoid determining whether each radio receiver embodied [a Hazeltine] patent," and the situation in *Zenith*, where the patent holder *compelled* the licensee to choose between a package license conditioned on the payment of royalties on unpatented products, or no license at all. 395 U.S. at 135–37, 89 S.Ct. 1562.[8] In other words, the critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor.

We disagree with CBS that such compulsion inheres in the present licensing system as regulated by the consent decrees and that defendants are therefore guilty of per se violations. As noted earlier, CBS makes no claim that either ASCAP or BMI has violated any provision of the consent decrees. The terms of the decrees do not by any construction suggest that CBS is in fact compelled to take a blanket license. To the contrary, ASCAP and BMI are required to offer per program licenses under which a fee is charged only with respect to programs in which a composition within the repertory has been performed; and to structure the fees for blanket and per program licenses so that the user has a genuine choice between them. Apart from the licenses available from ASCAP and BMI, the decrees leave a music user free to obtain licenses directly from copyright owners. This factor alone markedly distinguishes the present case from *Zenith*, in which Hazeltine, as the sole supplier of the patents in issue, had, for all practical purposes, unlimited leverage in bargaining the terms of any license to them.

C. CBS' Theory of the Burden of Proof

Taking a different tack, CBS also argues that "it is clear that [ASCAP and BMI] insist on licensing exclusively

8. The Court amplified the distinction as follows:

> If the licensee negotiates for "the privilege to use any or all of the patents and developments as [he] desire[s] to use them" he cannot complain that he must pay royalties if he chooses to use none of them . . . But we do not read *Automatic Radio* to authorize the patentee to use the power of his patent to insist on a total-sales royalty and to override protestations of the licensee that some of his products are unsuited to the patent . . .
>
> We also think patent misuse inheres in a patentee's insistence on a percentage of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use. Unquestionably, a licensee must pay if he uses the patent. Equally, however, he may insist upon paying only for use, and not on the basis of total sales . . . 395 U.S. at 139, 89 S.Ct. at 1585.

on a blanket basis" and that because they insist on such an "inherently restrictive" method of sale, they have the burden of proving the availability in the market place of acceptable substitutes, i. e., that CBS could obtain direct licenses sufficient to meet its needs from copyright proprietors. (CBS Post-Trial Brief at 15, 26–27) Neither the facts nor the law support the argument. As outlined later in this opinion, the evidence does not establish that ASCAP and BMI insist or have ever insisted on licensing on a blanket basis; and, of course, if they did, they would flatly violate the terms of the consent decrees.

In any event, the argument fails as a matter of law. CBS cites a number of cases for the proposition that a defendant who argues that the plaintiff can avoid injury by obtaining a substitute product bears the burden of proving such an assertion. See, *TV Signal Co. of Aberdeen v. American Telephone & Telegraph Co.*, 462 F.2d 1256 (8th Cir. 1972); *Fontana Aviation, Inc. v. Beech Aircraft Corp.*, 432 F.2d 1080 (7th Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S. Ct. 872, 27 L.Ed.2d 826 (1971); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied sub nom., Providence Fruit & Produce Bldg., Inc. v. Gamco, Inc.*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952); *Stanton v. Texaco, Inc.*, 289 F. Supp. 884 (D.R.I.1968).

[4] To secure injunctive relief in a private antitrust suit, the plaintiff must prove an actual violation of the antitrust laws or that such violation is impending and that as a result the plaintiff is threatened with loss or injury. *Zenith Radio Crop. v. Hazeltine Research, Inc., supra*, and *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 476 F.2d 989 (5th Cir. 1973). In the cases on which CBS relies, the plaintiff had indisputably established the first element, i. e., that the defendant had illegally denied him something he wished to purchase, for example, space in a fruit market, access to telephone poles for a cable TV installation, or an aircraft dealership. The defendant in those cases argued that the plaintiff had failed to establish the second element of its claim—injury or the threat of injury—because he had not proven that he could not avoid injury simply by purchasing a substitute product elsewhere in the market. The court in each case held that a plaintiff does not have the burden of proving the nonexistence of suitable alternatives in order to prove injury or the threat of injury, particularly when it is clear that no substitute will have the unique attributes of the product which the defendant denied the plaintiff. However, in none of the cases did the court suggest that the plaintiff does not have the burden of proving the first element: the restraint of trade itself.

Accordingly, the validity of CBS' argument that it does not bear the burden of proving that direct licensing is not a feasible alternative to the blanket license turns on whether the issue of "alternatives" relates to the element of restraint or the element of injury. We believe that it relates to the first factor: that is whether ASCAP and BMI have restrained trade. In the cases just discussed, plaintiff alleged that the defendant would not sell him something which he wanted to purchase, and the defendant argued that the plaintiff was not injured by the refusal because market substitutes were available. The present case poses an entirely different claim. The alleged restraint of trade is not that CBS is excluded from purchasing the services offered by ASCAP and BMI, and told to find substitutes elsewhere, but that (1) they allegedly offer only blanket licenses, which CBS says it does not want; (2) have combined to make any effort to obtain an alternative form of license (such as direct licensing) unfeasible; and (3) thereby compel CBS to continue to take a blanket license and to pay for music which it does not want to buy. Unlike the situations in the cases on which it relies, CBS *does not want the organizational defendant-seller*

product at all. Far from spurning "substitute" products, CBS claims that the use of a substitute constitutes an alleged restraint of trade. So much is clear when one considers the nature of the direct licensing alternative. It is not at all a "substitute" in the sense used in the "injury-avoidance" cases; it is another means of licensing (on an individual basis) the use of precisely the music which CBS would perform if it purchased a blanket license. If direct licensing is realistically available, it would enable CBS to pay only for the music it uses and for no other music, and would demonstrate that CBS' complaint in this action is unjustified.

[3] In sum, we adhere to our earlier conclusion, as embodied in the pre-trial order, that to prevail here CBS must prove that defendants' conduct in combining into ASCAP and BMI *compels* CBS to take a blanket license as alleged in the complaint. Proof that direct licensing is not a feasible alternative to the blanket license is an essential element of CBS' claim, on which it accordingly bears the burden of proof. Conversely, proof that CBS could obtain the necessary performance licenses directly from copyright proprietors would be fatal to its claim that they have pooled the rights to perform their music in a manner which illegally restrains trade in those rights. If the restraint is proven, only then do defendants have the burden of proving that the restraint is justified by the economic context in which music licensing for network television use takes place, and cannot be achieved by less anti-competitive means.

III.

The Stipulation as to Competitive Disadvantage

Prior to trial, the parties executed a stipulation which states in part:

> ". . . There is a portion of the performance rights to ASCAP music appearing on [CBS] programs as to which it would be impracticable for [CBS] or such producers to negotiate for licenses directly with the owners of the performance rights of said music. [Without limiting the parties' rights to adduce and offer additional proof with respect to any subject, both parties specifically reserve the right to adduce and offer proof regarding the reasons for such impracticability.]" (CX 2, ¶ 13; bracketed portion in original.)
>
> "If [CBS] chose not to have an ASCAP license, the producers of [CBS] programs did not obtain such licenses, and [NBC] and [ABC] had such licenses, to the extent that [CBS] or the producers of [CBS] programs did not otherwise obtain the performance rights to the ASCAP music which they desired to use on [CBS] programming, [CBS] would be at a competitive disadvantage vis-a-vis [NBC] and [ABC]."[9] (Id. ¶ 15)

CBS argues that, putting aside its proof at trial as to the impracticality of the direct licensing alternative, ASCAP and BMI have ceded the primary issue in the case by stipulating that CBS could not obtain direct licenses for all its music needs and that consequently, if it dropped its blanket license, it would be at a competitive disadvantage vis-a-vis networks which continued to hold such licenses.

We disagree with the contention that defendants have stipulated the case away. Paragraph 13 does not specify the "portion" of the compositions in the ASCAP repertory as to which it would be "impracticable" for CBS to license directly; and the extent of "impracticability" is critical to the feasibility of direct licensing. As detailed later in this opinion, the evidence establishes that

[9] BMI has stipulated with CBS that with respect to the practicability of CBS' obtaining direct licenses from BMI writers and publishers, BMI and CBS are bound by the determination in this case with respect to the practicability of CBS' obtaining direct licenses from ASCAP writers and publishers.

musical compositions are substantially interchangeable and that for any proposed use there are several, if not scores, of compositions which are equally suitable. Accordingly, even if CBS had access to far less than all of the compositions in the ASCAP and BMI repertories, that would not in itself render direct licensing unfeasible.

[6] Because a fair reading of Paragraph 13 does not indicate that ASCAP and BMI have admitted the unfeasibility of direct licensing, Paragraph 15 loses the dispositive force which CBS attributes to it. It is obvious that CBS might be at a competitive disadvantage vis-a-vis other networks if it held no music license. But that fact only raises, but does not settle, the question of what licensing methods are available to CBS. We regard the stipulation merely as an aid to the definition of the issues of the case. The extent of CBS' use of music, the kinds of compositions it needs, and the persons with whom it must deal to negotiate licenses for them are factors whose relevance to the feasibility of direct licensing is only suggested by the stipulation, on which the parties reserved the right to offer proof. The decision in this case rests on the evidence as to those factors, not the stipulation itself. Accordingly, we turn to the question whether CBS is in fact "compelled" as alleged in the complaint.

IV

Compulsion: The Quality of the Evidence

Defendants argue that CBS' case, which alleges the refusal of the defendants to license on terms which require CBS to pay only for the music it uses, falters at the threshold because CBS has not shown that it ever made a clear demand on defendants which they have rebuffed. It is true that several courts have imposed such a requirement in treble damage cases based on a conspiracy to deprive the plaintiff of a particular product. See, e. g., *Royster Drive-In Theaters, Inc. v. American Broadcasting-Paramount Theaters, Inc.*, 268 F.2d 246, 251 (2d Cir.), *cert. denied*, 361 U.S. 885, 80 S.Ct. 156, 4 L.Ed.2d 121 (1959); *Webster Rosewood Corp. v. Schine Chain Theaters, Inc.*, 263 F.2d 533, 536 (2d Cir.), *cert. denied*, 360 U.S. 912, 79 S.Ct. 1296, 3 L.Ed.2d 1261 (1959); *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F. 2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952). However, the requirement has not be imposed in any case of which we are aware, when the relief sought is an injunction rather than damages. Cf. *Zenith Radio Corp. v. Hazeltine, supra; Credit Bureau Reports, Inc. v. Retail Credit Co., supra*.

[7] Although we agree with CBS that it is not required as a condition to suit to have been unequivocally refused the kind of license it now seeks, defendants' argument highlights the unusual nature of CBS' claim and the kind of evidence on which it relies. CBS does not claim that it is compelled to take a blanket license because ASCAP and BMI, or individual copyright proprietors, have actually refused or threatened to refuse to negotiate with it for alternative methods of licensing. Instead, its position is that ASCAP and BMI *would* refuse to negotiate new forms of licenses whose fees are based on actual music use; and that individual copyright proprietors *would* refuse to deal with it on a direct licensing basis, or at least make it such a difficult proposition that CBS would be forced to resume its blanket license. Although proof of what might or might not occur under hypothetical circumstances in the future is customary when the plaintiff in a private antitrust action seeks to establish a threat of injury, CBS relies heavily on hypothetical proof in order to establish the existence of the restraint itself, the nonavailability of direct licensing.

[8] The other side of the coin just described is that CBS has made no effort to obtain the kinds of licenses it now complains defendants are unwilling

to grant. Although the absence of such evidence does not establish that CBS is not compelled to take a blanket license, we nevertheless regard it as highly relevant to that issue.

V.

The Break-Up of an Amicable Marriage

Until the institution of the present suit CBS appears to have lived quite happily with the blanket arrangement which it now disavows. Since 1929 it has obtained ASCAP blanket licenses for its various broadcast operations, the earliest one purchased on behalf of a radio station; and when CBS and other broadcasters established BMI in 1939, they agreed to take blanket licenses. Since its establishment in 1946, the CBS television network (CTN) has continuously held blanket licenses from ASCAP and BMI. Since 1950, CBS' negotiations with ASCAP for licenses for its television network have of course been conducted within the framework of the amended consent decree. Although, as noted earlier, the terms of the 1950 decree prohibit ASCAP from negotiating a blanket license prior to determining whether the user would prefer a per-program license,[10] CBS has never applied for relief under the decree complaining that ASCAP insisted on blanket licenses. Nor has the court ever been required to set a "reasonable fee" for the blanket licenses negotiated by the parties from time to time. CBS has never negotiated or held a per-program license from ASCAP or BMI for its television network and has never attempted to fulfill its music requirements by bypassing either organization and securing performance rights directly from copyright owners.

This suit did not follow a breakdown in negotiations for a new form of license, but for a renewal of CBS' *blanket* license from BMI. In April, 1969, CBS and ASCAP submitted for court approval agreements providing for final license fees as adjusted for 1969 and several prior years. Because the payments provided for in the agreements would have had the effect of sharply widening the historical ratio between BMI and ASCAP fees from CBS, BMI's President, Edward Cramer, protested to Donald Sipes, CBS' Vice President in charge of business affairs for the network, that BMI would insist on maintaining parity with ASCAP. After several meetings between Sipes and Cramer in 1969 during which the latter was unable to negotiate higher fees, BMI gave notice on October 29, 1969 that it was exercising its right under the consent decree to terminate CBS' license, effective January 1, 1970.

CBS did not apply for relief under the decree. Instead, on December 19, 1969, more than a month and a half after BMI's notice of termination, and less than two weeks before termination would become effective, the President of the CBS television network, Robert D. Wood, wrote to ASCAP and BMI requesting each of them to "promptly submit to us the terms upon which you would be willing to grant a new performance rights license which will provide, effective January 1, 1970, for payments measured by the actual use of your music." This was the first such demand CBS had made. By letter dated December 23, 1969, Herman Finkelstein, ASCAP's general counsel, replied that ASCAP would consider the proposal at its next Board of Directors meeting on January 29, 1970; that it regarded CBS' letter as an application for a license in accordance with the consent decree; that CBS would in the meantime have an interim license for 60 days "at rates and terms to be negotiated, or determined ultimately by the court;" and that representatives of ASCAP would meet with CBS counsel on January 12, 1970 to discuss the application further. (PX 201)

By letter dated December 23, 1969 Cramer replied to CBS' request on behalf

10. See note 3, *supra*.

of BMI and stated that "The BMI Consent Decree provides for several alternative licenses and we are ready to explore any of these with you." (PX 202) CBS did not, however, pursue the matter further. Instead it commenced this lawsuit a week later, on December 31, 1969.

Neither the history of the relationship between the parties nor the events leading to this action remotely suggest that CBS has been compelled to take a blanket license it did not want. Indeed, CBS does not even appear to have seriously considered available alternatives to the blanket license prior to the commencement of suit. CBS' Vice President in charge of business affairs and planning for the network, Donald Sipes, was its principal witness as to the undesirability of blanket and per program licenses, and the need for a license under which the fee would be based strictly on actual use. Sipes testified that he first decided to explore alternatives to the blanket license sometime in 1968 or 1969. Although he was almost completely unacquainted with the intricacies of music licensing, he spoke to only three people in the course of his exploration. Two of these, Robert Evans and John Appel were house counsel for CBS. Sipes spoke to them only in their capacity as counsel, and did not seek their advice on the business aspects of licensing. The third person Sipes consulted was Emil Poklitar, the CBS employee in charge of the clerical personnel who process music logs and case sheets submitted by program producers to be sure the necessary rights have been cleared. Poklitar is not a business man and his duties involve a narrow portion of the music licensing spectrum.

Despite Sipes' lack of expertise, neither he nor his colleagues at CBS consulted any music writers, publishers, television producers or any other expert in the field about possible alternatives to the blanket license. (Tr. 151, 204, 358, 371) No one at CBS ever conducted a feasibility study about presently available or proposed methods of licensing the music to be performed on its television network. (Tr. 156–57) Indeed, Sipes testified that he did not even speak to other CBS executives about alternatives to the blanket license; he considered the alternatives entirely on his own initiative. (Tr. 180, 369) In sum, CBS thought very little indeed about revising its licensing practices prior to Robert Wood's "demand" letter to ASCAP and BMI just prior to the commencement of this suit. The evidence described hardly supports CBS' contention that it has been compelled to take a blanket license. To the contrary, it suggests that CBS did not even view music licensing as a business problem until immediately prior to suit.

VI.

The Claim That the Structure of the Market Bars Direct Licensing

In the absence of direct evidence that ASCAP and BMI and their members and affiliates have refused to negotiate licenses which reflect actual music use, CBS' claim that it is compelled to take a blanket license hinges on proof that the direct licensing alternative which exists in theory under the consent decrees is not a viable method for securing the necessary performance rights.

CBS claims that it established at trial that the defendants have structured the market in such a way as to lock it into a blanket licensing arrangement and to make any attempt to license its music needs directly so prohibitively risky as to preclude it even from trying. The basic elements of this claim are illustrated by the following syllogism: First, it would be uneconomic for CBS to attempt direct dealing while it still holds a blanket license, because it would then be paying twice for the same music: that is, since the blanket license fee covers unlimited use of the ASCAP or BMI repertory, direct licensing transactions would involve the purchase of additional licenses for music already covered under the blanket arrangement. Second, because copyright proprietors and televi-

...on networks have never engaged in di...ect dealing, the transactional machinery ...ecessary to negotiate and clear direct ...enses between CBS program produc...rs and the large number of individual ...pyright proprietors has not been de...eloped; and the absence of such ma...hinery creates a "barrier" to direct ...censing. Third, because the blanket li...ense system insulates copyright propri...tors from price competition among themselves, they have no incentive to create the necessary machinery, and indeed would refuse to deal with CBS if it attempted to license its needs directly. Fourth, the risk of a refusal to deal is par...ularly acute in relation to CBS' present inventory of programs and films, which contains a large number of performances of copyrighted music whose initial runs on television were licensed under a blanket license. If CBS dropped its blanket license, it would need to seek direct licenses for the music contained in any programs which it plans to rerun because a rerun constitutes a performance for profit. Accordingly, the CBS inventory would be vulnerable to "hold-ups" by copyright proprietors who could either refuse to license their music at all, or exact a premium price for it.

In sum, CBS claims to have established that because there is at present (1) no market machinery for direct dealing; (2) no expectation that it will be created; and (3) reason to believe that proprietors would refuse to deal with CBS, particularly with regard to programs in its existing inventory which it wishes to rerun, direct licensing is not a feasible alternative and defendants illegally compel CBS to continue to take a blanket license. To understand the evidence relating to these claims, it is necessary first to describe the nature and extent of CBS' use of music.

VII.

CBS' Use of Music

Music is used on network television in three principal ways: as theme, background or feature music. Theme music is the music used to introduce and close a program. Background music is used to complement action on the screen. Feature music is music used as "the main focus of audience attention" (PX 469); for example, a performer singing a song on a variety show. Occasionally, however, well-known compositions suitable for feature use may be used as background music, for example, "Tea for Two" as background to a tea party scene. CBS concedes that it would be a simple matter for it to obtain direct licenses for most of the theme and background music it uses, and that the key to the feasibility of the direct licensing method is whether it can obtain licenses for the feature music and some of the background music it needs. To understand why this is so, some familiarity with the manner in which television programs are produced is necessary.

As noted earlier, CBS itself produces virtually none of its "entertainment" programming. Apart from the news, public affairs, sports and special events programs—which CBS does produce and which make little use of music—the bulk of the programs broadcast over the network are acquired from independent program production companies, or "packagers." Some of the packagers are well-known Hollywood "majors," such as MGM, Universal and Paramount. Variety shows and some of the filmed serials are produced by smaller production companies, which are sometimes owned by the star of the show. For example, the "Mary Tyler Moore Show" is produced by MTM Company, Ms. Moore's own; and "The Carol Burnett Show" is produced by her husband's company.

Ordinarily, the music used on entertainment serials is almost exclusively theme and background music composed especially for the program. For example, after the program has been filmed or taped, the producer typically hires a background composer to view the film, decide which action requires musical background, score the music and arrange and conduct the music scored. The producer pays the writer a fee for this

work and acquires the copyright from him, as an "employee for hire." Theme music is created the same way, but the same music is of course used from week to week over the life of the series.

The producers of most of CBS' regular programs own publishing subsidiaries which acquire the copyrights for the music which has been specially composed for the program. For example, CBS itself owns April Music, which in turn owns the rights to the background music used in "Gunsmoke." The producer of "The Carol Burnett Show" owns Burngood Music and Jocar, which acquire the music specially created for that show such as background music for comedy sketches. Major studios, such as Universal, own major publishing houses, such as Leeds Music, which in turn own the rights to music created for Universal's television programs. The publishing subsidiaries receive royalty distributions from ASCAP or BMI for performance of music on the shows created by their parent company. The royalties are of course a small fraction of the amount the producer receives from CBS for the program package itself. CBS may pay upwards of $200,000. for a one hour episode of a dramatic serial; the publisher's performance royalties for that program may amount only to about $1,500.

This description of the process by which theme and background music is created makes clear that CBS can easily acquire performance rights for such music as part of the same transaction by which it acquires the program itself. Because the program production company, or its publishing subsidiary controls the rights to music specially created for the program, CBS could license the right to perform that music at the same time and place as the overall right to televise the program.

In contrast to theme and background music, feature music is not usually composed especially for the program. Rather, it is music which has been previously composed, and is controlled by a publisher who is not connected with the program production company. Feature music, and theme and background music whose copyrights are controlled by an "outside" publisher, cannot of course be licensed as a part of the overall transaction by which CBS acquires the program. Instead, in order to obtain rights to such music, it would be necessary for CBS or the program producer to approach the publisher who owns the rights to the music in question. As noted earlier, it is the feasibility of obtaining the licenses to this "outside" music on which the viability of the direct licensing alternate substantially depends.

In order to establish how much of CBS' music needs would require "outside" direct licensing transactions (as opposed to "inside" transactions with the program producer or his publishing affiliate whose feasibility CBS generally concedes) both sides have introduced into evidence computer runs which they claim establish the extent of CBS' music use in the three basic categories. In general the computer runs and the testimony relating to music use verify what the average television viewer would assume. CBS' news and public affairs programs use virtually no music; the staple situation comedy, crime and drama series use almost exclusively theme and background music specially composed for the program; and feature and background music controlled by outside publishers not connected with the program producer is used regularly on a small group of programs: variety shows and variety specials, sports shows (e. g., football halftime shows), late night talk shows, and the "Captain Kangaroo Show."

Although the parties are in agreement as to the general pattern of CBS' music use, they differ in their claims as to precisely how much music CBS uses in each category and how evenly its use of music is distributed over the program schedule.

We believe it fruitless and unnecessary to determine the question whether CBS or defendants have more accurately interpreted the data as to CBS' use of

music. It is fruitless because, as both sides concede, the data of record do not permit complete analysis. It is unnecessary because the validity of the conclusions which the parties seek to draw does not at all hinge on the few percentage points which separate the parties. Thus, defendants argue that the available data show that some 85–90% of CBS' programs use only "inside" music which could be conveniently licensed through the program packager, or no music at all; and that the music for another 5% of the programs could be licensed by seeking performance rights from only one "outside" publisher. According to defendants, only 3–4% of CBS' schedule is made up of programs (such as variety shows) which make heavy use of outside music, requiring licenses from several outside publishers. Accordingly, defendants argue, CBS could acquire the necessary performance rights for nearly all of its programming without the creation of the "machinery" which CBS claims (as discussed below) is required to facilitate transactions between producers and publishers. This assertion is not inconsistent with CBS' argument that, even adopting defendants' figures, direct licensing for the few programs which do make heavy use of "outside" music would be impracticable in the absence of "machinery" to service the large number of transactions which would be required. In short, no matter whose figures are closer to the truth, the question would remain whether the lack of "machinery" destroys the feasibility of direct licensing as an alternative to the blanket license and constitutes an illegal restraint of trade.

VIII.

Are There "Mechanical" Obstacles to Direct Licensing?

A. The Legal Significance of "Machinery"

[9] Prior to trial the parties stipulated that ASCAP members and BMI affiliates "have not established facilities or procedures" for processing requests by music users for direct licenses for performance rights. (CX 2, CX 3) CBS argues that the fact that the individual defendants have not established such "machinery" constitutes a "barrier" to direct licensing which compels it to take a blanket license. (CBS Post-Trial Reply Brief at 29) Putting aside the question of the kind of machinery CBS claims to be necessary and whether its absence does in fact make direct licensing of outside music unfeasible, we disagree with CBS that defendants' mere failure to have created machinery amounts, without more, to an illegal refusal to deal. (CBS Post-Trial Reply Brief at 27)

As outlined above, CBS has not, in the many years it has held blanket licenses, indicated a wish to fill its music needs by means of direct licensing. There is no evidence of substance that before bringing this suit it ever considered such an alternative in its own business planning. The only expression of its dissatisfaction with the blanket system was the "demand" letter sent by the network President, Robert Wood, two weeks before the commencement of this suit. That letter did not even refer to direct licensing, nor of course to obstacles, such as the lack of "machinery," which arguably prevented CBS from engaging in direct dealing with copyright proprietors. Rather, the letter related only to CBS' request for alternative methods of licensing *through ASCAP* and *BMI*. In short, there is no evidence that CBS gave any thought to the need for machinery, or noticed its absence, prior to this litigation.

It is simplistic, in view of these facts, to argue that "by virtue of [defendants'] preemption of the field, there are absolutely no facilities in existence for . . . direct licensing . . ." (CBS Proposed Findings at 37). The "field" consists of buyers as well as sellers, and by taking a blanket license for twenty years, CBS (as well as other broadcasters) has "preempted" any need

for the machinery whose absence is now claimed to constitute an antitrust violation. We are unable to accept the proposition that defendants have had the obligation to create the framework for a direct licensing system, particularly in the absence of any indication that CBS would ever wish to use it. There is no evidence, and indeed CBS does not claim, that defendants have refrained from creating the necessary machinery for the purpose of injuring CBS. In these circumstances, the fact that defendants have so far done nothing to facilitate direct licensing does not support the conclusion that they are illegally restraining it.

B. Problems Allegedly Created by the Lack of "Machinery"

Putting aside the question whether the mere absence of machinery illegally restrains trade in the market for performance rights, CBS has failed to prove that there are substantial mechanical obstacles to direct licensing. CBS postulates that under its new proposed licensing system it would pass on the job of licensing "outside" music to the production companies. In such a case, inside music would be conveniently licensed through the program packager and its publishing subsidiary. However, the producer would take on the additional job of obtaining rights to the outside music to be used on the program by contacting the publishers in question (or their agents, as described below) and dealing for the performance rights.

CBS' principal witnesses as to the need for machinery were Robert Wright, associate producer of "The Carol Burnett Show," and Edward Vincent, a former staff member of several network programs. Wright and Vincent are in the position of those who would use whatever machinery is required for direct licensing. In general the testimony of these witnesses was not persuasive, and their views on machinery were vague and abstract.[11] (e. g., Tr. 482–83, 500, 687) Three basic claims emerge from their testimony. First, CBS asserts that the producer in a direct licensing world would sometimes have difficulty in identifying the publisher of a given composition in order to approach him for a license. The argument is based on the fact of life in the industry that publishers' catalogs shift as they buy and sell copyrights, so that the publisher listed on the sheet music or record label may no longer own the composition when the producer wants to license it. CBS further claims that even assuming the producer can locate the publisher, the negotiations will be beset by confusion because, as defendants concede, music publishers have no established procedures for dealing with requests for performance licenses. Accordingly, the argument goes, direct licensing would be impracticable until settled ways of negotiating licenses are developed and publishers train their staffs to handle licensing. Finally, even assuming the producer can speak to the publisher in a language he can understand, CBS claims that difficulty would be caused by provision in certain contracts between writers and publishers requiring that the writer's consent be obtained prior to the grant of a direct license by the publisher. A provision requiring such consent appears in the form contract of the American Guild of Authors and Composers (AGAC). CBS claims that ASCAP's computer runs of CBS' music use

11. We note in passing that most of the testimony of Wright and Vincent as to the need for "machinery" related to the peculiar needs of producers of CBS' few variety shows, which make unusually heavy use of outside music and are produced on short production schedules. CBS did not offer proof as to how the needs of variety show producers for "machinery" differ from the needs of producers of programs which use outside music less regularly and in more modest amounts, and in which speed is not of the essence in the licensing transaction. Accordingly, even if we found the testimony of Wright and Vincent to be more persuasive than we do, it would be of limited value to establish the extent of the "machinery" necessary for shows other than variety shows.

show that some 40% of the outside music it uses is written by AGAC composers, a figure we adopt arguendo; and that the need to obtain writer consents for the use of that music would delay direct licensing transactions and disrupt the tight production schedules under which some programs are produced, particularly variety shows.

[10] For the reasons stated below, we find that CBS' claims as to the effect of lack of machinery are without merit. There are two basic flaws in CBS' general approach. First, CBS' premise that it would abruptly cancel its blanket license and seek to fulfill all its music needs by direct licensing on the next day (see, e. g., Tr. 463, 633, 1874, 1912–13) is utterly unrealistic. If CBS took such a course there might well be problems of the kind just described. But this would not be proof that defendants have created obstacles which render direct licensing unfeasible. As noted earlier, nothing in the antitrust laws requires defendants to maintain well-oiled machinery for direct licensing for the benefit of CBS. Indeed, there is no support in the record for the proposition that CBS could even as a matter of internal business planning, switch over to direct licensing without a long period of advance preparation. Accordingly, to presuppose, as CBS does, that the feasibility of the direct licensing alternative is to be judged literally as of "tomorrow" miscasts the issue. The proper question, we believe, is whether such mechanical obstacles as exist could be remedied within a reasonable period prior to cancellation of the blanket license.

The second flaw in CBS' approach is that it postulates that new direct licensing machinery would of necessity be an edifice entirely distinct from the machinery which now exists for the purpose of licensing other kinds of rights in music, in which ASCAP and BMI do not deal. As outlined earlier, the program packager is responsible for obtaining all rights necessary to televise the program except performance rights, which CBS obtains from ASCAP and BMI. These rights include "synch" rights, that is, the rights required for any program which is to be rerun. Program producers now obtain "direct" licenses for synch rights from publishers through "machinery" created for that purpose. Similarly, movie producers obtain from publishers the rights to record and perform the music they use, (i. e., "mechanical rights" or "mechanicals") and there is "machinery" for this purpose as well.

Thus, although CBS is literally correct that "there are absolutely no facilities in existence for the direct licensing of [performance] rights by music publishers or other proprietors" (CBS Proposed Findings at 37), it overstates the issue to assume that such facilities would have to be created "from scratch" (CBS Post-Trial Brief at 40). The narrow question in the first instance is whether, as ASCAP and BMI contend, the machinery which publishers and producers now use to license other kinds of music could be adapted to facilitate the licensing of performance rights as well.

C. A Look at Other Kinds of Machinery

Apart from television performance rights, other rights in copyrighted music include motion picture synchronization and performance rights, and television synchronization rights. While ASCAP and BMI do not deal in these rights, facilities to license these rights directly from copyright owner to user do exist.

The television synchronization right is the right to record copyrighted music on the soundtrack of a filmed or taped program. Such rights are required for programs which are to be rerun, as distinguished from those (such as sports events or certain "one-run" taped programs) which are regarded as "live" performances. The grant of T[illegible] "synch" rights is almost exclusively brokered through the facilities of the Harry

Fox Agency, Inc., which represents virtually every major publisher, about 3,500 in all. As outlined by Fox's Managing Director, Albert Berman, and by Robert Wright and Edward Vincent, who are members of producers' staffs, the typical "synch" rights transaction starts with a telephone call to Fox from the producer or from Bernard Brody or Mary Williams, synch rights agents located in Los Angeles who represent producers in their dealings with Fox. Because Fox has instructions regarding each publisher's fee structure, (or, more often, is familiar with it on the basis of past experience) it is usually able to quote prices over the telephone for the compositions which interest the producer. The entire transaction, including actual issuance of the license, is completed within two to three days at most. Fox issues several thousand television synchronization licenses annually, using a basic staff of only two employees.

A "movie rights" transaction consists of the licensing of the performance right *and* synch right in one package for use in a theatrical (as distinguished from television) motion picture. The versatile Fox Agency also represents publishers in the licensing of these rights. The negotiation is similar in form to the TV "synch" rights. As described by Marion Mingle, the Fox employee who handles movie rights, producers call or write to Fox requesting price quotations on a number of compositions. Mingle or her assistant then telephones the publisher and outlines the nature of the film and the kind of use which is to be made of the composition in question, so that he can quote the price for the right. Generally, the producer either accepts or rejects the various quotations on the spot; sometimes, however, he may make a counter-offer which Mingle passes on to the producer. In general, Mingle can quote prices to the producer within two days. She and her assistant license several hundred movies each year.

D. Could Other Kinds of Machinery Help CBS?

As note earlier, CBS claims that the non-existence of direct licensing machinery in the television performance rights field would practically bar direct dealing in several critical aspects: the producer would have difficulty in identifying the copyright owner of a song which had been sold to another publisher; the AGAC writer-consent requirement would delay the licensing transaction and disrupt production schedules; and publishers would be unable to handle requests for licenses because they have no staffs or procedures for direct dealing in performance rights and have not created a central facility such as the Fox Agency to facilitate contact between producers and publishers. These claims dissolve in view of the evidence as to the licensing of other rights in music.

1. Finding Copyright Proprietors

In most cases the producer of a CBS show would have no difficulty identifying the "outside" publisher of a song for which he wants a performance license because he or his agent already deals directly with that publisher to obtain a synch license for the same song. As former CBS Vice President in charge of programming, Michael Dann noted, any program on tape or film is likely to be rerun, and program packagers usually obtain synch rights at the time the program is produced. Wright, who is on the staff of "The Carol Burnett Show," testified that problems in clearing synch rights are "rare." Edward Vincent, a former staff member of "The Jim Nabors Variety Hour," testified that the Bernard Brody Agency would have no difficulty in giving him the name and address of any copyright owner.

Even if lines of communication to obtain synch rights were not already established, there are several other ways in which a producer could identify the publisher of music he plans to use. Emil Poklitar, who works in CBS' music

clearance department stated that CBS maintains a file containing the relevant information on over 100,000 compositions. Indeed, as Wright testified, publishers regularly barrage television producers with catalogs and brochures to promote the use of their music. Where they have not done so, there appears to be no reason why CBS could not simply request the catalogs of the major publishers. Finally, it should be stressed that in the vast majority of cases, the copyright owner listed on the sheet music or phonograph record is still the owner of the composition in question.

2. The AGAC Writer-Consent Requirement

Nor has CBS proven that the writer consent requirement in the AGAC form contract would cause significant delay in direct negotiations for performance rights. At present, publishers are required to obtain an AGAC writer's consent for television synch licenses for songs over ten years old, and movie synch licenses for vocal use of a composition. (3M PX 31) Although Leon Brettler, Vice President of Shapiro, Bernstein & Co., a major publisher, testified that he has occasional difficulty contacting a writer who is on vacation or has just changed residence, the record establishes that meeting the consent requirement rarely causes delay in the issuance of a license. In addition to Brettler, several publisher witnesses were asked if they had trouble getting in touch with their writers. For example, Edwin H. Morris, who owns a company bearing his name, testified he has had no difficulties in doing so. Salvatore Chiantia, of MCA Music, testified that he is routinely able to locate his writers and obtain their consent. The reason why publishers have little difficulty in contacting an AGAC writer and obtaining his consent promptly is not hard to fathom: writers are intensely eager to have their work performed on television. Many AGAC writers have simply given advance blanket consent to their publishers to avoid the risk that the producer will, because of time pressures, substitute a different song. As Chiantia stated in a letter to AGAC concerning consents for background uses (PX 84):

> ". . . if we are not able to give licenses to TV film producers at $25. per film, or if we have to obtain the written consent of each writer for each individual use, we would for all practical purposes never get the compositions from our catalogs into current TV films other than in a few rare instances. The writers who have given us their approval are aware of the competitive situation which exists in connection with the use of music in the filmed TV programs produced in Hollywood. It is because of that very reason that they gave us their okay to go ahead." (PX 84)

In the same vein, Louis Bernstein of Shapiro, Bernstein & Co. wrote AGAC:

> ". . . Please bear in mind that the authors and composers who come into our office are desperately hungry for performances, which means money from ASCAP. A good number of writers have urged us to get them these performances and stop worrying about the AGAC technicalities. Even so, 19 out of 20 writers would gladly give us any authorization in writing, but since we are dealing with several thousand writers, it becomes a difficult job to be so technical." (PX 162)

There is every reason to believe that most writers would either give their publishers blanket consent for performance licenses, or give it promptly on a use-by-use basis, just as they presently do regarding synch rights. As Chiantia testified:

> "It is no different than the situation with respect to synchronization rights. Why do you have any greater difficulty in this matter than you have in synchronization rights? There are certain synchronization rights that you need that I have to get my writer's permission on and you get them. Why suddenly do you have

such a great problem in respect of getting performance licenses where you don't have that same problem in getting synchronization licenses." (Tr. 2970)

3. The Need For Centralized "Machinery"

Although CBS has failed to prove that producers seeking performance licenses could not identify copyright owners, or that the writer consent requirement would significantly delay direct licensing of performance rights, we agree that direct licensing on any major scale would require some central clearing machinery through which transactions could be brokered. Without such machinery, direct licensing might be mechanically feasible, but would be a bulky and inefficient system: for a program producer (or an agent such as the Brody Agency) to contact each of the publishers whose compositions interest him, for every program, would of course be distinctly time-consuming and expensive.

In the past, the Fox Agency has responded to publishers' needs for central "direct-licensing" machinery for new kinds of music rights by expanding its long roster of services. Defendants argue, accordingly, that music publishers would turn over the job of clearing television performance rights licensing to Fox as well. CBS replies that defendants oversimplify the problem of creating machinery because there can be no assurance that the Fox Agency will agree to take on the job of brokering performance rights. Of course, it is possible that Fox would refuse the opportunity to expand its business. But the lack of hard evidence on the point is chargeable to CBS, not defendants. Never having explored the feasibility of direct licensing, CBS has not given Fox any occasion to consider the possibility of brokering such licenses. In any event, there is no substantial basis for concluding that the Fox Agency would not expand its services to include television performance rights, just as it has expanded in the past to meet the need of publishers for a central agency for movie performance rights and television "synch" rights. However, even if Fox were unwilling to take on the job of brokering performance rights, the creation of a new agency modeled along the same lines need not be the imposing project CBS makes it out to be. Albert Berman, Fox's Managing Director, testified as follows:

"Q Mr. Berman, you were asked by Mr. Hruska on direct something about suppose publishers ask you to take over licensing of public performances on network television. Do you remember that question?

A Yes.

Q And as I understood it, you said that you wanted to make a study before giving a detailed answer.

A Yes.

Q Let me ask this, sir: Would the task be significantly different from the task you now have when licensing TV sync rights?

A Only in numbers. It is certainly much more formidable merely because the uses would be so much greater. But the job could be done, I assume, with enough people and enought physical equipment." (Tr. 973–74)

Berman did not testify, and CBS did not offer proof, as to how many people and how much physical equipment would be required. According to CBS' projections, which we adopt arguendo, the number of direct licensing transactions required each year from outside publishers would range from approximately four thousand to eight thousand. (The low figure is projected from a period in 1971 when CBS had three night-time musical variety series; the high figure is based on a period in 1970 when it had seven such programs. CBS does not make a projection for the season which began in the Fall of 1974, during which it offered only one variety serial, "The Carol Burnett Show.") The question is

whether CBS' projection of some 4,000 to 8,000 transactions would entail a large number of complex tasks requiring a massive staff, or a simple task repeated four thousand times by a relatively modest one. CBS' posttrial submissions strain to give the impression that each time a producer wished to use a certain type of composition, Fox or its newly created equivalent in the performance rights field would have to contact several different publishers, who in turn would have to check whether the AGAC writers (if any) whose music is involved would give their consent to the grant of a license, and then begin active price negotiations for the song or songs in question. (CBS Post-Trial Brief at 37–44, Reply Brief at 39–40)

It is unrealistic to assume that such cumbersome procedures would be involved in a direct licensing world; indeed CBS' own papers offer the key to streamlining the job. As noted early in this opinion, CBS seeks as one form of relief in this suit the establishment, under court supervision, of what it calls a "per-use" system. Under the per-use system, as outlined by CBS,[12] musical compositions would continue to be licensed through ASCAP and BMI, but instead of taking a blanket license, CBS would license individual compositions, for which it would pay a specified fee for each use of music from the per-use "reservoir." The fee for each license would be fixed in a schedule reflecting the nature of the use (e. g., theme, feature or background) and other appropriate factors, such as duration of use. CBS suggests that one convenient way to set a fee schedule is to adopt the present formula by which ASCAP and BMI give royalty "credits" to their members and affiliates. (CBS Post-Trial Reply Brief at 71) The question which naturally arises, and CBS does not answer, is why publishers would not readily adopt the same concept of a fee schedule[13] under a direct licensing system, in which case a centralized computer would store information as to prices as well as other necessary information for each publisher's catalog.

Of course, it is not for the court to propose a system for direct licensing. Nevertheless, on studious review of the record, we are left with the belief that careful planning would go far to remove any significant "mechanical" obstacles to direct licensing for performance rights. It is true, as CBS points out, that new personnel would have to be trained to handle the task. But the only evidence on the point indicates that new central machinery could be staffed primarily by clerical personnel, as it is at Fox. The period required to train such personnel is presumably measured in weeks or months, rather than years.

Such a finding is supported by CBS' own scenario as to how things would go

12. The outline of CBS' "per-use" proposal are set forth at note 7, *supra*.

13. Instead of addressing itself to the feasibility of a fee schedule in a direct licensing world, CBS postulates that a central licensing agency for performance rights would require a "massive" staff because the negotiation of such rights would be more time-consuming and complex than the "cut-and-dried" negotiations which are the rule in the television "synch" rights field: setting a price for the former would involve factors such as the nature and duration of the use and the unique attributes of a particular song (e. g., "Happy Birthday"). The argument is without merit. It is true, as CBS points out, that in most cases television "synch" rights negotiations are fairly clean cut. However, synch rights *and* performance rights for movies are negotiated in a single package; and accordingly the nature of the movie rights transaction provides a more relevant basis for determining CBS' argument that performance rights negotiations would be a complicated matter. As described by Marion Mingle, who handles movie rights at the Fox Agency, the increased complexity of the performance rights transaction amounts to asking the producer about the nature of the intended use and passing on the information to the publisher. (Tr. 870–71, 876–77) Mingle testified that she can generally supply quotations to producers within two days and, as noted earlier, she and a single assistant handle all of the several hundred movie rights licenses Fox issues each year.

in the event it prevailed in this suit: either of its proposed forms of relief—the establishment of its "per-use" system under ongoing court supervision; or a mandatory injunction against the issuance of blanket licenses to any network by ASCAP and BMI—would require the development of "machinery" at least as extensive and very much of the same pattern as that involved in a direct licensing system under the consent decrees. For example, if CBS won an injunction against the issuance of blanket licenses, it would of course be faced with the very same mechanical "barriers" to direct dealing of which it now complains so strenuously. Nevertheless, Donald Sipes, CBS' Vice President in charge of business affairs and planning for the network, freely conjectured that in such an event the lack of "machinery" would pose no problem because ABC–TV and NBC–TV would be "in the same boat":

"A Under that assumption, all three networks are in the same boat. In other words, neither one of the three—that's bad English—but none of them have a competitive advantage, you see, over the others.

Q Assuming that, then what?

A Assuming that with a lot of struggle and some chaos up front, I think again that the machinery necessary to broker deals between the sellers and the buyers in this situation will spring up to fill that gap. There is a need, there is money to be made, and people will spring into that breach to fill that need and make it happen. And deals, direct deals will be made for musical compositions between buyers and sellers.

Now, I do believe, of course, that it will take some time for that machinery to develop up front, but of course all three networks in that situation would have that same problem.

Q Suppose, Mr. Sipes, the injunctive order, in other words the order prohibiting ASCAP and BMI from licensing television networks, the effective date of that order was deferred for a period of, let's say, a year. Would that remove the struggle you mentioned earlier in your answer? Would that solve that problem, in your mind?

A I think that during that time the machinery would develop, yes, sir." (Tr. 79–80)

[11] As we view the matter, CBS is not entitled to relief in this suit simply for the purpose of insulating it from the risk of competitive disadvantage vis-a-vis other networks if it makes the business decision to experiment with a new method of music licensing. If CBS' Vice President in charge of the very subject at hand concedes that within one year suitable machinery would "spring up," no reason appears on this record why it could not in any event plan to change over to direct licensing, effective one year hence, without a court order to spur the effort.

CBS' sole response is that copyright proprietors would not of their own accord leave the safe haven of ASCAP and BMI and expend their resources to set up the machinery for direct dealing because they are afraid to engage in price competition for their works; and that only a court order could provide the "signal" that they must do so. The argument is unpersuasive. Assuming that copyright proprietors would in fact be willing to deal with CBS producers—a conclusion we reach in the next section—they would logically create an efficient mechanism to facilitate it (as they have in the case of other music rights), if only to hold down their own costs. In any event, the cost of creating new machinery would be passed on to music users, just as it is at present through ASCAP, BMI and the Fox Agency.

In sum, as stated earlier, CBS might well have "machinery" problems if it cancelled its blanket license "tomorrow." But this is not proof that defendants have created "barriers" to direct licensing in order to compel CBS to take a blanket license; it is just as consistent with the fact, which the evidence establishes, that no one, including CBS, imagined that the blanket license would lose its charms until shortly before this suit. Because CBS does not claim that it would commence direct licensing tomorrow (although its counsel often questioned witnesses on the assumption that it would), the relevant question is whether the relatively modest machinery required could be developed during a reasonable planning period. The evidence establishes beyond doubt that it could.

IX.

Would Copyright Owners Attempt to Thwart Direct Licensing?

A. The Nature of CBS' Proof

In the absence of proof that direct licensing is unfeasible because of mechanical obstacles CBS' case rests primarily on its claim that copyright proprietors would refuse to deal directly if CBS asked, or at least make it such an arduous and expensive proposition that CBS would be forced to resume the blanket arrangement. (CBS Post-Trial Reply Brief at 29) Indeed, in a substantial sense, the "disinclination issue," as it has come to be called in the course of the lawsuit, is the major factual issue in the case. As CBS' post-trial papers recognize, even questions such as mechanical feasibility hinge almost exclusively on the willingness or unwillingness of the defendants to smooth CBS' course or obstruct it, as the case may be. (See, e. g., CBS Proposed Findings at 45–47)

Such a claim is difficult to prove even in the best of cases, and the present suit is no exception. CBS' Vice President Donald Sipes testified that CBS has never sought a direct license. The three CBS witnesses who predicted that writers and publishers would refuse to deal with producers were Sipes, and producers Robert Wright and Edward Vincent. Their testimony on the point was unimpressive, particularly inasmuch as none of them had ever spoken to a publisher or a writer in relation to performance rights licensing. Vincent's direct testimony is representative:

"Q Let's go back to the delays you said you anticipated getting a secretary on the telephone, et cetera. Don't you think that copyright proprietors are going to see to it that all those delays are removed in this world in which the CBS Television Network has cancelled its ASCAP–BMI licenses?

A No, I don't believe that because I am assuming on the basis of this particular lawsuit, that ASCAP and BMI like things the way they are.

If you are asking me to assume that they are going to have a parade for me if I tell them in front I am going to run an end run around their entire organization and attempt to deal direct and circumvent the ASCAP and BMI—

THE COURT: I don't think that is the question Mr. Hruska asked you. I think he asked you whether you wouldn't expect the copyright owners to make quick arrangements to deal with you if CBS didn't have a—

A No, sir, I don't, and that's the reason I don't. I don't believe that they would want to see that particular system succeed.

THE COURT: Do you have any basis for saying that?

THE WITNESS: Well, as I began to state before, your Honor, there is a system under which they are operating now, which I

assume for them is a very good system and that they like—" (Tr. 636–37)

* * * * * *

"THE WITNESS: Your Honor, it is my opinion that we are talking about members of a group, of a group that has banded together for a very specific reason, and they have sought the shelter of this group for good and reasonable reasons, again, I assume.

You are also asking me if I think that I am going to expect them to want to deal with me?

THE COURT: Yes, I am.

THE WITNESS: To come toward me and say, 'Yes, let's make a deal,' after I have circumvented their group.

No, your Honor, I don't believe that prudent business sense dictates that I should believe that.

THE COURT: I mean that's just on your general experience, you are saying that?

THE WITNESS: Yes, sir." (Tr. 639–40)

Despite the testimony of Sipes, Wright and Vincent that many if not most ASCAP members and BMI affiliates would be "disinclined" to deal directly with producers for performance rights, none of them could give the name of even one actual publisher or writer whom they thought would fall into that category. Sipes has never spoken to a copyright owner. (Tr. 204, 358). Wright, who is associated with "The Carol Burnett Show," was "confident" that ASCAP members would be reluctant to deal with him, but was certain that Joe Hamilton, who wrote the theme music for the show would be inclined to deal (Tr. 489). Edward Vincent, of the Jim Nabors show, stated that the two writers with whom he had actually worked would deal with him (Tr. 726). CBS' economist Franklin Fisher, also expressed the view that ASCAP members would be reluctant to deal but, like Sipes, he has never spoken to a writer or publisher (Tr. 4853).

In the absence of evidence that any ASCAP member or BMI affiliate has ever refused or even threatened to refuse to grant CBS direct performance rights for any composition, CBS offered evidence as to (1) the strong economic incentives which would deter copyright proprietors from direct dealing (2) the experience of the Minnesota Mining and Manufacturing Company (the "3M" incident) in direct licensing its music needs for a background music tape and tape-player which it marketed in the mid-1960's and (3) the ease with which defendants could thwart a direct licensing attempt by CBS, by exacting premiums for the licensing of music already taped or filmed, (music "in the can") which has until now been covered by a blanket license.

B. The Alleged Incentives to Ref[use] Deal

CBS' Post-Trial papers postulate the fact, which we adopt arguendo, that participants in the market for performance rights are rational businessmen motivated by the wish to maximize profits. It excuses its failure to pursue alternatives to the blanket license by arguing that "no reasonably prudent manager of a television network" would subject his company to the risks involved. (CBS Proposed Findings at 33, 36) By a similar line of reasoning CBS contends that no prudent copyright proprietor would voluntarily relinquish the bargaining leverage and shield against price competition which ASCAP and BMI provide. According to CBS' theory of the case, these essentially hypothetical facts establish both the restraint (i. e., the unavailability of the direct licensing alternative) and the threat of loss (i. e., the economic risk involved in the attempt). We are skeptical of the validity of this general approach, for the issue is not what CBS or copyright proprietors perceive their respective risks to be, but whether CBS has established that its fear that copyright proprietors

would in fact attempt to thwart a direct licensing attempt is justified. With that caveat, we turn to the relevant evidence.

It is true, as CBS relentlessly emphasizes, that most of the writer and publisher witnesses who testified, by deposition or at trial, expressed a strong preference for the blanket licensing system. The preference is no surprise in view of the fact that the blanket license is the only way in which performance rights have been marketed to television networks for nearly thirty years. Moreover, the writer-publisher testimony establishes that, from their standpoint, the system is trouble-free and self-executing and the financial rewards are satisfactory. None of them expressed the wish to exchange their present, relatively uncomplicated way of doing business for what they viewed as a new mode involving unfamiliar procedures and possible financial uncertainty

CBS stresses selected portions of the deposition testimony of several publisher witnesses who expressed themselves vigorously when asked to comment on such questions as the possible prohibition of the blanket licensing system. Several common themes pervade the portions of their testimony which CBS stresses: the recognition that there is a large number of publishers and writers who would be competing for exposure on the CBS network; that many of them might face financial difficulties as a result of possible intense competition in a very limited market; and the strong preference for licensing through ASCAP and BMI, which have a measure of bargaining clout in dealing with CBS, the world's largest "consumer" of music.

We may agree that the cited testimony proves that writers and publishers prefer the present system and are apprehensive of dealing directly with CBS. However, this by no means proves the obverse: that copyright owners would refuse to deal with CBS if it discontinued its blanket license and insisted upon dealing on a direct licensing basis. Indeed, the snippets of testimony on which CBS relies are replete with the Darwinian imagery of cutthroat competition among hungry publishers and writers seeking network exposure. The colorful deposition testimony of Leon Brettler, an officer of Shapiro, Bernstein, Inc., is an example:

"Q Do you think that there would be a good deal of price cutting by publishers in the licensing of performance rights to television networks?

" . . .

A In this case I haven't got the slightest hesitation of saying not that I know, but I am virtually positive there would be a deluge of price cutting bordering on the cutthroat nature that would lead to mutual self-annihilation.

" . . .

"I mean among us competitors who would be so desperate and jockeying for position, none of us having any strength, dealing with one huge user or an industry that is a huge user, consisting of three main entities and we only have those three doors open to us and all 4000 of us converging through that door, I think there would be tremendous amounts of concessions and price cutting and deals." (Dep. 295–98)

* * * * * *

"I think that it would have substantial impact across the board, even to the big companies . . . the largest music publisher is still David compared to the Goliath of the television industry. The so-called top ten are still Davids compared to Goliath and the only time that I have ever heard of David whipping Goliath was in the Bible. Usually Goliath swamps David." (Dep. 302–03)

We do not view this testimony as aiding CBS' case. It tends rather to establish

that copyright owners would line up at CBS' door if direct dealing were the only avenue to fame and fortune.

More significant, however, is the fact that, when read in their entirety, the depositions take on an entirely different hue. For example, Brettler testified that "there is no question of the fact that we would negotiate something" if a producer requested performance rights (Dep. 184–85), and that "hordes" of other publishers would do the same. (Dep. 304–05) Edwin H. Morris, who operates another publishing company, expressed anxiety similar to Brettler's. However, far from stating that he would not deal with CBS, he testified:

"Q Let us assume that telephone does ring, that you are approached by producers and/or network people who are interested in obtaining direct licenses to the compositions or various of the compositions in the Morris catalog. Do you talk to these people?

A Yes.

Q Do you invite them to come into your office?

A I will even go to theirs." (Dep. 211–12)

The conclusion that CBS has failed to prove that the "disinclination" of writers and publishers to leave the blanket system would ripen into a refusal to deal directly is fortified by the trial testimony. Although most of the writers and publishers who testified expressed concern similar to those of CBS' deposition witnesses,[14] all but one of them testified that he or his company would negotiate directly with CBS for performance rights, and most of them believed that their attitudes were representative of others in their position. For example, Arnold Broido, President of the Theodore Presser Company, testified:

"Q * * *

"Let us suppose there came a time when CBS no longer held licenses from ASCAP and BMI and came to you to negotiate or seeking to negotiate direct licenses with you for public performance of compositions in your repertory.

What would be your reaction?

A We would deal with them, of course.

Q Would you tell us why?

A Well, there is really very little else that we could do. We would have no choice in the matter. We would regret it because, obviously, it would be an inconvenience to us and we would regret the breaking of the relationship but we would deal with them." (Tr. 3492–93).

Broido also stated that:

"the publishers would by and large talk with CBS or anyone else who came to them." (Tr. 3498)

Salvatore Chiantia, President of the Music Division of MCA, Inc., testified:

"My primary responsibility is to get my music played. To get it exposed. And if I have to go to CBS in a direct licensing scheme, I am going to go. I am not going to sit back and say, I hope you fail. I want you to use my music and I am going to try to make it work." (Tr. 2957)

"There are only three games in town. I have to play one of three games. If we are talking about television, there are only three games in town. If I am effectively cut out from one, I only have two more to play with." (Tr. 2947)

The response of the composers who testified was similar to that of the publisher witnesses. For example, the dean

14. We note in passing that only one of the four deponents on whose testimony CBS relies in support of the "disinclination" issue was called by CBS to testify at trial.

of American composers, Aaron Copland, expressed reluctance to change the blanket arrangement, but testified that he would engage in direct dealing if necessary:

"Q Now, it has been suggested in this lawsuit that in the event that the Columbia Broadcasting System Television Network for some reason or another no longer held a license from ASCAP and BMI it might come to you, as an individual copyright proprietor, as an individual composer, and seek a license from you for the right to perform your copyrighted work or works.

I would like to ask you, sir, whether if someone from Columbia came to see you you would be inclined or disinclined to deal with them or what would your reaction be?

A Well, I think I would be rather regretful about the need to individually concern myself with the licensing of a particular work, since the present arrangement takes care of a great many of those chores, as I would think of them, and it seems a comfortable arrangement as it now exists, from our standpoint at any rate.

Q If, however, the question were squarely put to you, will you deal with CBS or will you refuse to deal with CBS, what would your answer be?

A Well, I think my answer would be that of most composers. If they want to get a performance, they will do what is necessary to get the performance and if they have to deal with CBS, they would, I suppose, agree to deal with them." (Tr. 3485–86)

Composer John Green testified to the same effect:

"Q Mr. Green, suppose the following hypothesis. That CBS canceled its ASCAP blanket license and NBC and ABC continued to hold blanket licenses from ASCAP and suppose that either CBS or a producer of a CBS film series show came to you and sought to engage you, to write the background and theme music for the show.

Would you be inclined or disinclined to negotiate with him for the writing of that music?

A I would be inclined to negotiate with him.

Q Do you have an opinion as to whether other background writers and composers would be inclined or disinclined to negotiate with CBS or its producers in that situation?

* * * * * *

Q Do you have an opinion?

A I know how I would like to answer that question. I don't have an opinion but I would be surprised if they didn't feel exactly as I do.

* * * * * *

Q Mr. Green, can you tell us why you would be inclined to negotiate with CBS or the producer of the CBS show in that situation?

A For the following reasons. I like to think that part of my motivation is aesthetic and artistic, but I am also a fellow who earns his living by the making of music in various forms. I am also an artist who derives only secondary pleasure from thinking how great my music is when I hear it in my head.

I like to hear it performed and I like to get paid for hearing it performed and you referred to [CBS]—would I be inclined to negotiate with [CBS] for the performance? Well, they are one of the principal outlets in the world for the performance of music and I want my music to be performed, I want the public to hear it, I want to get paid for it and I would be totally inclined to negotiate with anybody who would like to use it.

Q Mr. Green, you have also told us that in addition to your work as a background composer you have written songs in your music career.

Suppose in that situation we posited just a moment ago, CBS canceling its ASCAP license, suppose one of your publishers called you up and told you that the producer of a CBS variety show is interested in using one of your compositions, one of your songs, on a show, and he asked you for your opinion or view, would you be inclined to recommend that he license or negotiate with CBS or the producer or would you recommend that he not negotiate with CBS or its producer?

A I would recommend that he negotiate.

Q And why?

A Because I would want my song to be exposed and I would also want to derive the revenue that would come from such a source as [CBS] for that exposure." (Tr. 3457–60)

Perhaps it is not surprising that Walter Dean, who was called by CBS, was the only witness to testify that the publishers for whom he worked would probably refuse to grant licenses to CBS. The publishers are April and Blackwood, companies which CBS owns, and whose catalogs consist mostly of copyrights owned by CBS as well.

Although the testimony of the writer and publisher witnesses persuasively suggested that they would deal directly with CBS, at least *ex necessitate*, our conclusion that CBS has not proven that they would refuse to do so does not rest solely on their testimony. The extensive evidence on the nature of the music industry amply confirms the proposition.

The two most salient features of the television music market are the enormous value to copyright proprietors of network exposure and the markedly limited opportunities for securing it. Copyright proprietors are eager to have their music performed on television not simply to earn performance royalties distributed through ASCAP and BMI, but because a television performance before millions of viewers is the most effective way to sell phonograph records and sheet music, and to generate performances by other music users. No less than eleven witnesses testified to the compelling desire of writers and publishers to gain television exposure for their music. To that end, publishers regularly direct extensive promotional effort toward the networks, including the mailing of advance copies of sheet music or recordings to producers, performers and musical directors of television shows. Some publishers use promotional brochures or other written materials; others solicit by telephone. The record establishes beyond doubt that even in what CBS characterizes as a comfortable, blanket license world devoid of price competition, television network performances are highly sought by copyright owners.

The eagerness, and occasional desperation, of copyright proprietors is heightened by the fact that there are so few opportunities to win the prize. There are only three television networks and, as noted earlier, few programs which make appreciable use of previously published music; most programs either use no music at all or "inside" theme and background music published by the producer. The testimony of Alan Shulman, Vice President of the Belwin Mills Publishing Corp., aptly summarizes the situation:

"Q Are any of your promotional activities aimed at getting your music played on network television?

A Yes. But there are very, very limited number of opportunities to do this. For example, because of the number—well, they are limited pretty much to the variety shows that appear on the television networks and these are fewer in number of recent years than they were previously.

Q Why are your opportunities limited to the various shows?

A Well, because the other shows are basically prerecorded. Prefilmed, et cetera. The series, et cetera, are done and produced beforehand and the

music that is performed and synchronized and used in those programs are pretty must controlled by the producers of the particular program.

And these producers, in fact, very often are publishers themselves who control the publishing rights and, naturally, are not too happy to use other people's music unless they absolutely have to because there is income from it." (Tr. 3083–84)

In fact, apart from variety programs, producers seldom "have to" use "other people's music." With rare exceptions, a considerable number of copyrighted songs are suitable for any use a producer might have in mind. Although every copyrighted composition is philosophically or aesthetically "unique" and its uniqueness is dignified by copyright, virtually none of the four million compositions in the ASCAP and BMI repertories is unique in the mind of a television producer. CBS' producer witnesses Wright and Vincent, testified that "any number" of songs would fit a producer's intended use and that "there would always be, obviously, alternates." (Tr. 419, 586) Copyright proprietors are keenly aware that their compositions are substantially interchangeable with the compositions of other writers and publishers, a factor which could well be expected to dissipate any "disinclination" to deal with CBS, which might otherwise exist.

Moreover, CBS' enormous power within the music industry supports the testimony of the writers and publishers who said they would engage in direct licensing. CBS is far more than a television network. It is, as Michael Dann, former Senior Vice President of CBS in charge of programming testified, "The No. 1 outlet in the history of entertainment" and "the giant of the world in the use of music rights." (Tr. 3374) CBS is the largest manufacturer and seller of records and tapes in the world (Tr. 4615); it owns radio and television stations in a number of major metropolitan areas. On CBS' own theory that composers and publishers belong to the race of economic men, it is doubtful that any copyright owner would refuse the opportunity to have his music performed on CBS, much less wish to incur CBS' displeasure. It would risk not only the loss of CBS performance royalties, but royalties from the sale of records sold by CBS subsidiaries and from radio plays of their records on fourteen radio stations operated by CBS in the seven largest cities in the nation.

Moreover, many of the largest publishers are, like April and Blackwood, subsidiaries of large entertainment companies. A number of the named defendants or their parent corporations are program packagers or movie distributors who compete to sell their products to CBS. For example, Famous Music is owned by Paramount and Leeds Music is owned by Universal. The royalties received by these publishing subsidiaries are a small fraction of the amount CBS pays for the program or film. It would be a rhetorical question to ask whether such producers would risk the sale of a program package to CBS because of the disinclination of its publishing subsidiary to engage in direct dealing for the music performance rights.

C. The "3M Incident"

In support of its disinclination theory, CBS also relies heavily on the experience of the Minnesota Mining and Manufacturing Company (3M) which sought direct licenses from publishers in connection with its marketing, in the mid-1960's of a tape and tape player (the M–700 project) designed to provide 24 hours of background music. The M–700 was designed for use in small commercial establishments, such as restaurants, stores, and doctors' and dentists' offices.[15] To this extent, the M–700 was similar to the packages offered by other

15. We assume that the 3M project was not designed for the extensive play it has received in federal court.

vendors of background music services such as the well-known Muzak. In one important respect, however, it was different: 3M planned to sell its tape outright, while other vendors leased theirs for a limited term.

3M retained Allen Arrow, an attorney, to negotiate performance licenses for the M–700. Initially, Arrow approached ASCAP for licenses but during the ensuing discussions several problems arose. For example, ASCAP wanted, and 3M did not want, different rates for different classes of users. According to Arrow, ASCAP took the position that the consent decree, which prohibits it from discriminating between similarly situated licensees, barred it from offering a "one class" license because it would discriminate against vendors of background tape systems for larger establishments, such as Muzak and Seeburg. In addition, ASCAP found serious difficulty in 3M's proposal to sell its tape outright because ASCAP would be required, after the expiration of an initial three year license term, either to try to relicense 3M's customers for a renewal term or, if they refused, to fight a losing battle trying to police possible infringement in a number of small establishments whose individual royalty payments would amount to some $10. per year. Although 3M, as a potential user, was entitled to invoke the licensing and rate-fixing procedures available to it under the consent decree, Arrow testified that 3M chose not to take that course because of time pressures in assembling the project and other such factors. In the circumstances, ASCAP suggested to 3M that it deal directly with copyright proprietors.[16]

There is considerable evidence that the publishers 3M approached viewed the M–700 proposal with some reservations. Some of them were concerned about the novel form of license 3M sought; others about the policing problem; others about the amount of money involved; and still others about the implications of such a proposal for the traditional ASCAP structure and their customary way of doing business. Nevertheless, 3M signed contracts with 27 of the 35 publishers it approached. It obtained all of the music it needed within its time schedule at a cost of about three quarters of the amount of its first offer to ASCAP.[17] Shortly thereafter, 3M began another successful program to obtain licenses for a second series of M–700 tapes.

Although the statistics do not favor its case, CBS stresses the fact that 3M was able to reach agreement with "only" 27 of the 35 publishers it approached. It argues that a large music user like CBS could be expected to meet considerably greater resistance in a direct licensing effort than 3M, whose rather modest needs for direct licenses could not have threatened to topple the ASCAP structure. Defendants argue, on the other hand, that the 3M incident demonstrates that direct licensing is feasible. It points to the fact that, in the last analysis, 80% of the publishers 3M approached put aside whatever "disinclination" they might otherwise have had to direct dealing, and engaged in business negotiations over a business proposition.

We hesitate to give important weight to the 3M incident as evidence of the likelihood that copyright proprietors would attempt to frustrate CBS' efforts to engage in direct licensing. In the first place, 3M is hardly as large a music user as CBS. Moreover, it sought licenses for a highly fragmented group of small users, rather than for a huge television network. Finally, the form of li-

16. Because 3M was able to license its needs for BMI music from BMI, it did not seek licenses from its affiliates.

17. 3M's first offer to ASCAP was $27. per tape for three years (3M PX 2). ASCAP was asking between $21. and $30. per tape *per year*, or a total of $63. to $90. per tape for the initial license period (3M PX 7). For its direct licenses, 3M paid $21. per tape per year. Thus, it paid $6. less per tape than the amount of its first offer to ASCAP.

cense which 3M solicited, involving a package of compositions from a publisher for a three year term is not comparable to a license for one performance of a single composition before an audience of millions. In short, CBS and copyright proprietors would be trading for a very different horse than did 3M and the publishers which it approached. Moreover, the evidence as to the 3M incident was developed in large part through documents and deposition testimony; and included considerable hearsay in the testimony of Allen Arrow. We cannot give significant weight to arguments as to the state of mind (e. g., disinclination) of the publishers approached by 3M based on such evidence. Nevertheless, CBS has made the 3M incident a central part of its disinclination claim. For the reasons set forth below we find that the incident, if it proves anything at all, establishes that copyright proprietors would deal with CBS for direct licenses.

In our view, the bare fact that 8 of 35 publishers were unwilling to sign a contract with 3M has no legal significance; the only relevant question is why they did not. To the extent that the motivations of the unwilling publishers can be gleaned from this record, it appears that general opposition to direct licensing and loyalty to ASCAP played a very small part; and that in general where 3M's proposals were rejected there were legitimate business objections to them. We detail some of these below.

1. *3M's Negotiations With Publishers*

Chappell & Co., Inc. was the first publisher 3M approached. Initially, it found 3M's offer very attractive, but ultimately refused it because of concern that the sale of the M–700 tape would, in effect, put a perpetual free performing right in the hands of 3M's purchasers unless ASCAP licensed and policed those rights. Chappell's concerns appear to have been justified because, as matters turned out, only about a third of 3M's purchasers agreed to pay for licenses to use their tapes after expiration of the initial three year term.

3M next approached MPHC, a publishing company owned by Warner Brothers. MPHC's initial response was favorable, but the MPHC official authorized to make a final agreement was ill, tions. By the time he had been replaced, and died during the course of negotia- 3M had met its licensing needs. In 1967, 3M negotiated and reached oral agreement with MPHC for licenses covering a subsequent series of tapes, but 3M then decided not to consummate the transaction.

Like Chappell & Co., Famous Music Corp. expressed serious reservations about the possibility of policing the renewal term performance rights, and after consulting ASCAP it rejected 3M's proposal. In 1967, Famous resumed negotiations with 3M for a second tape series and a tentative agreement was reached, but 3M dropped the proposition because at that point it expected to make a bulk licensing agreement with ASCAP covering the second series, which as matters turned out, did not materialize.[18]

The Edwin H. Morris Company did not accept the 3M proposal because it thought, in Morris' words, that 3M was "trying to get something for virtually nothing." (Dep. 131) The evidence establishes that Morris had completely misunderstood the amount of money 3M was actually offering; and that he would have negotiated if there had not been a failure in communication. (Dep. 129–31, 137–41)

Irving Berlin Music, Inc., initially turned down the 3M offer for reasons which are not clear. It appears to have been reluctant to license except through ASCAP, largely because 3M proposed to use too small a number of Berlin songs to make a different decision worthwhile.

18. However, ASCAP and 3M subsequently reached agreement on a license package for a third series of tapes, the "M–1200".

Berlin changed its mind as to the second tape series but again 3M backed out in anticipation of licensing these later tapes through ASCAP.

By the time 3M approached The Richmond Organization it had made sizeable deals with other publishers. Accordingly, it was unwilling to guarantee the use of a sufficiently large number of Richmond songs to make the transaction attractive. Negotiations broke down on that issue. For Richmond, as for other publishers, policing was a problem directly related to the number of songs to be used: above a certain threshold, the cost of relicensing and policing might have become economically worthwhile. For Richmond, that threshold was not reached. Subsequently, Richmond contacted 3M's representative to express its interest in the 3M program, but because 3M wished to use only about 12 Richmond songs, negotiations again fell apart.

In addition to these publishers, 3M failed to conclude agreements with Robbins, Feist & Miller, Bregman, Vocco & Conn, and Frank Music. The first two publishers were the only ones whose reluctance to deal appears to have been motivated from a sense of devotion to ASCAP. Frank Music refused 3M's offer for the initial series of tapes because, like Richmond Brothers, it was concerned about the related problems of policing and the number of tapes to be used. However, it approached 3M to negotiate a license for the second series of tapes and agreement was reached.

We conclude, that, at best, the 3M incident does not favor CBS' case. The publishers which 3M contacted were offered varying proposals and responded as they thought appropriate to their respective legitimate business interests. Four fifths of them accepted the proposal, the remainder rejected it; and some rejected it the first time around but sought to be included in 3M's second series. The evidence contains no breath of parallel conduct. Those who had fears relating to the problem of relicensing and policing proved to be justified in their fears. Virtually all the publishers responded to 3M's unusual proposal as essentially a clean-cut business proposition; none of them refused entirely to negotiate with 3M. On such a record, no general inference of unwillingness to engage in direct dealing with 3M can be drawn. Even if it could be, it would be unwarranted to impute any such inference to the very different circumstances prevailing in the market for performance rights to music used on CBS.

2. The AGAC Ploy

CBS also stressed the role played by The American Guild of Authors & Composers (AGAC) in the 3M incident in voicing opposition to the issuance of direct licenses by their publishers. AGAC, which is not a party to this action, is a trade association of some 2,400 composers whose traditional concern has been the problems of composers in dealing with their publishers, such as the proper calculation of royalties. About 8% of the writer members of ASCAP and writer-affiliates of BMI are AGAC members. During its 45 year history AGAC has on occasion complained to publishers or to ASCAP and BMI that the interests of its members were not being protected. However, it has never brought suit against anyone; its principal technique appears to be the enthusiastic use of rhetoric.

AGAC's role in the 3M incident fits this general pattern. Although AGAC responded to the news that publishers had granted licenses to 3M in its typically vociferous way, the actions it took in opposition to the 3M program were untimely and ineffective. 3M started to negotiate with publishers in October 1964, and by June of 1965 had already licensed the first series of tapes. It was not until November of 1965 that AGAC sent a form letter to publishers protesting that they had failed to secure writer consent for certain songs covered by AGAC contracts and suggesting that publishers refrain from licensing 3M. However, the AGAC letter clearly had

no impact on 3M's efforts: it was circulated after licenses had been obtained for the first series, and after the eight publishers who declined the 3M proposal had told 3M of their decision. To this day 3M has continued to obtain licenses for its M–700 series directly from publishers. AGAC has not even attempted to lobby against the practice since 1966.

As CBS points out, a "radical" wing of AGAC which styled itself the West Coast Committee, criticized the AGAC Council for its mild-mannered response to the 3M project, and one of its strident letters appears to advocate a conspiracy by publishers to refuse to deal. However, the central AGAC Council in New York rejected the proposals on the advice of its lawyers.

In sum, CBS has seriously overreacted to the role of AGAC and the West Coast Committee in the 3M incident. Although there is testimony which supports CBS' view that the feelings of some writers run high when talk of direct licensing is in the air, the significant facts are that AGAC took no effective action against the 3M project and refused to adopt the suggestion of the West Coast Committee that radical action was appropriate. These facts, together with the evidence of AGAC's declining influence over the past ten years, and the strong desire of writers to gain exposure for their work do not support any inference that AGAC would or could take effective action against a direct licensing effort by CBS.

D. The "Music in the Can" Problem

1. The Significance of "Music in the Can"

Television programs or movies which have been filmed or taped are said to be "in the can." Music recorded on the soundtrack of such films or tapes is called "music in the can." At any given time, CBS has a large inventory of programs or feature films, much of which it will rerun over the network. CBS argues that if it cancelled its blanket license, the proprietors of compositions in the can, knowing that the music could not practicably be removed from the soundtrack, would exact premium prices for performance licenses: CBS would be forced to pay these premiums or risk infringement litigation.

CBS claims that by virtue of their leverage, copyright owners of music in the can could easily thwart any direct licensing attempt; and this fact accounts for the "business judgment of the [CBS] management that an attempted by-pass of ASCAP is not a realistic alternative . . ." (CBS Proposed Findings at 60–61). We disagree with CBS' analysis. Putting aside the fact, noted earlier, that CBS does not appear to have considered the feasibility of direct licensing prior to this suit, evidence of the ease or difficulty with which the antitrust laws may be violated cannot be equated to proof that the violation will occur.

Indeed, even if CBS had proven that some copyright owners would attempt to extract a premium price for their music in the can, that fact alone would not, absent proof of parallel conduct, tend to establish that defendants have violated the antitrust laws. At any point in the normal course of its business, CBS has a sizeable inventory whose make-up is continuously shifting from one season to the next as old programs and films are "retired" and new ones replace them. CBS obviously knew, when it accumulated its current inventory[19] that some form of performance license would ultimately be necessary for the second runs of the programs and films within it. These circumstances, however, do not result from the fact that CBS has continuously taken a blanket license, by "compulsion" or otherwise. To the contrary, they flow from the networks' practice of rerunning films and programs. Regardless what system of licensing CBS uses,

19. We note in passing that CBS acquired most of its in the can inventory after the commencement of this action (AX 326).

its inventory would be vulnerable to "hold-ups" every time CBS puts music in the can without obtaining performance rights for future runs of the program in question. The fact that CBS has failed to secure such rights for reruns of the present inventory is hardly the defendants' fault. No defendant has ever refused CBS a license for any music in the can or out, if for no other reason than that CBS has never asked.

In sum, *any* changeover to direct licensing, even in a world of complaisant composers and publishers equipped with sturdy "machinery" may subject the CBS inventory to hold-ups by the greedy ones among them. However, simple greed, independently expressed, does not constitute a restraint of trade.

In any event, CBS has not proven that its fears of a "hold-up" by copyright proprietors are justified. CBS' principal witnesses in support of its "in the can" theory were its Vice President in charge of business affairs and planning, Donald Sipes, and its economist, Franklin Fisher. Neither of them has ever met a copyright proprietor, nor is either more than cursorily acquainted with the music licensing field. As was true of their testimony on "disinclination," the basis for their conclusion that copyright owners would "hold-up" CBS for rights to music in the can was that it would be economically rational for them to do so (see, e. g., Tr. 1686–87). Even taken alone this is not persuasive evidence, and it is clearly outweighed by the more concrete proof offered by defendants. For example, Albert Berman of the Harry Fox Agency testified that television producers often prepare programs without synchronization licenses and negotiate such licenses *after* the programs are in the can without being "held up."

> "A . . . There is a certain confidence on the part of producers that they will not be held up by publishers when they want to use a song after the fact.
>
> Q Do you have any opinion as to what the basis is for that confidence?
>
> A The basis is that the users and providers of music have to live together. Nobody wants to lock himself up in a closet and not have them used. The producers are aware of that. It is a common interest that would prompt this type of action." (Tr. 981a–82)

Moreover, although we need not reiterate at length the basis of our earlier conclusion that no copyright proprietors would wish to fall into CBS' disfavor, the publishers who testified as to the "in the can" problem confirmed that view. Their statements on the point were highly persuasive. For example, Salvatore Chiantia of MCA Music Inc. testified as follows:

> "A . . . I believe the question here is whether a music publisher would take advantage—let us discard the term holding up—whether a music publisher would take advantage of a situation in which something has already been recorded and a license is subsequently sought.
>
> There have been any number of occasions when that has arisen in the licensing of mechanical reproduction and in the licensing of motion pictures, theatrical motion pictures.
>
> Very often, a theatrical motion picture will be made and the song recorded and the synchronization license is subsequently sought. In those cases, speaking for MCA, we have never held up anybody. We have never been unreasonable. We have licensed.
>
> in the cases of mechanical reproductions, there are cases in which recording companies actually record a song before ever asking for a license. In those

cases we would certainly hold them up if we wanted to, but we don't because it would be bad business practice.

There are some people in our business who make a habit of being unreasonable. There are a number of people. You mentioned Happy Birthday before. There is another very famous person with whom I have done a great deal of business, who lives in Paris, who makes my life miserable because she refuses to allow me to license under certain circumstances.

Well, those people are generally identified and people watch for them. Certainly in my business of being a music publisher I don't know of any company that has ever had to say, 'Watch out for Chiantia or MCA; they'll get you.'

We know that we are in this business and we intend to stay in this business and the way we stay in the business is by establishing some kind of a rapport and good will with our writers and customers.

* * * * *

We want the door to remain open for us and if you start holding up record companies or the people with whom you do business, you are in real trouble." (Tr. 2895–98)

Even assuming, contrary to the evidence, that some publishers would be drunk with power at having CBS on the spot, CBS has overstated the dimensions of the problem. Most of its inventory is comprised of theatrical motion pictures (i. e., movies), most of whose music is theme and background music controlled by the film producer's affiliated publishing company (PX 994, AX 287, BX 167). The "problem" of licensing this music is similar to the problem of licensing the "inside" theme and background music for CBS' regular television programming: it can be obtained from the producer itself. Of course, the producer *could* hold out for a large premium, but only on pain of losing large sales of his principal product, movies, to one of only three potential network buyers. It does not need to be repeated that the price of music performance rights is a tiny fraction of the price of a program or film.

Most of the remainder of CBS' in the can inventory is regular programming which is often rerun in the course of a season. As discussed earlier, most of CBS' serials use only theme and background music owned by an inside publisher. The factors just described as to movies in the can apply equally to other programs in the can.

Unfortunately, CBS has not offered evidence regarding the average life span of a given inventory of programs and films (or of categories of such programs and films), or the portion of the inventory which it actually intends to rerun. The absence of such evidence renders the "in the can" argument even less acceptable. For example, it may be that some television serials have a basic life of one year; if so, that portion of the inventory would be "consumed" during the inevitable interval between CBS' notice of termination of its blanket license and the date on which it actually commenced direct licensing for all its needs. For these programs, as well as the programs or films which CBS does not intend to rerun, there would be no "in the can" problem because there would be no need for performance licenses.

2. Commercials "in the Can"

CBS also claims that television commercials containing copyrighted music present a similar "in the can" problem. Advertising agencies do not ordinarily purchase performance licenses for the music they use. Instead they get a free ride on the networks' blanket licenses. Accordingly, CBS argues that if it cancelled its blanket license, a number of commercials "in the can" could not be

used unless either the advertising agency or CBS paid the premium license fee which CBS feels sure would be exacted. The claim is without merit. Only a fraction of television commercials use music at all. (AX 263, AX 264) In those which do, the copyright proprietor is normally the advertiser on whose behalf the music was made. As Paul Marks, ASCAP's Director of Operations testified, "most of the commercials use music that is written directly for those commercials, [by an 'inside' composer] and in the overwhelming majority of cases, almost all the cases, the writer grants all rights to the sponsor or the advertising agency and makes no reservation of any rights to receive ASCAP distributions." (Tr. 2548) Of course, the sponsor or the advertising agency is the last person who might be expected to hold up CBS for licenses to use the music in its commercials.

A minimal number of commercials use previously published music for which CBS or the advertising agency would have to obtain a performance license from an "outside" publisher. For example, of the 1300 commercials created by the J. Walter Thompson Advertising Agency in 1972, only 21 used copyrighted music (AX 263, AX 264), or less than 2%. As to this miniscule percentage, it is worth repeating that few music publishers would hold up CBS or the world's largest advertising agency for a premium if they hoped to have their music used in preference to that of another publisher. Indeed, because commercials have a normal life span of six to eighteen months (Tr. 1873) CBS might well avoid any problem otherwise posed by "commercials" in the can simply by giving reasonable notice of the cancellation of its blanket license: most of the commercials in question would have run their short life before CBS commenced a direct licensing system.

X.

A Word About Per-Program Licenses

As outlined earlier, CBS concedes that it could license the music for most of its entertainment programs without difficulty by requiring the program packager to deliver performance rights together with the rest of the package. A substantial portion of CBS' other programming, such as news and public affairs programs, makes little or no use of previously published music. As to these two large categories, therefore, CBS could license the music used on an other-than-blanket basis. The programs which make by far the heaviest use of "outside" published music are weekly variety shows and variety specials, late-night talk shows, and the "Captain Kangaroo Show," which in the aggregate comprise a very small portion of CBS' program schedule. Assuming, contrary to the evidence, that the changeover to direct licensing would necessarily meet with mechanical problems until the "machinery" was properly oiled and adjusted, such problems would be acute only in relation to the few shows, such as variety shows, which regularly use music of outside publishers and are produced on short production schedules. For such shows, where speed and efficiency in clearing performance rights may be at a premium, a per-program license, which the consent decrees require ASCAP and BMI to offer, could be a logical alternative. Such a license gives the user unlimited access to the entire repertory, but requires him to pay only with respect to programs which actually use ASCAP (or BMI) music.

Although CBS has never sought to negotiate with ASCAP or BMI for a per-program license, it argues that such a license is not a feasible alternative. The argument is based on the assumption that the provisions of the per-program license negotiated between ASCAP and an All Industry Committee of owners of local television stations would be imported wholesale into any per-program license for network television use. (CBS Proposed Findings at 108–09) The local television license form provides that the station can avoid paying a per-program license fee for certain uses (e. g., motion pictures) only by obtaining di-

rect licenses for all of the music contained in the program and by giving ASCAP seven days' notice of the direct license. CBS claims that such a license would not meet its needs because of the possibility that for a given variety program it might be successful in obtaining direct licenses for, say, only 90% of the music it needs, but would still need to purchase a per-program license at the full rate to cover the remaining 10%.

The argument overlooks several critical facts. CBS is of course not bound to agree to the terms of the local station per-program license, nor may ASCAP or BMI insist on any particular terms. To the contrary, they are required by the respective consent decrees to offer per-program licenses on terms which are justified by applicable business factors[20] and which give the user a genuine choice between it and other forms of license, such as the blanket license. Because CBS has never sought to negotiate a per-program license, there is no way to know what its terms might be. For example, there is no legal obstacle and no evidence of an unmanageable factual obstacle which would prevent it from bargaining for a license which gave it "credit" (i. e., a reduced rate) where it had obtained direct licenses for part of the music to be performed on the program in question. Indeed, because the decrees enjoin ASCAP and BMI from interfering with the direct licensing of compositions,[21] on the face of it, it would appear that CBS could argue in consent decree proceedings, if necessary, that ASCAP and BMI are required to offer a per-program license whose price is reduced to reflect the number of direct licenses obtained for the program. In view of these facts CBS' claim that the per-program license is not suitable for its needs is, at best, premature. Indeed, because CBS makes heavy use of "outside" music on very few programs, there appears to be no reason why CBS could not feasibly turn to a combination of direct licenses, for shows using inside music or outside music of the one or two publishers; and per-program licenses, for those programs on which it makes heavy use of outside music.

XI.

Summary of Findings

[12–14] On review of the record, we conclude that CBS has not met its burden of proving that defendants illegally restrain trade in the market for performance rights for network television use, and compel it to take a blanket license as alleged in the complaint. CBS has failed to prove that there are significant mechanical obstacles to direct licensing. Nor has it established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license.

Even assuming, contrary to the evidence, that many publishers and writers would initially adopt a wait-and-see attitude under a direct licensing system, it is clear on this record that any resistance they might manifest would quickly dissolve, and that CBS could easily fill its music needs in the meantime. The music industry is highly fragmented. There are over 3,500 publishers and many thousands of composers who are eager for exposure of their music, and well aware that their compositions are, with rare exceptions, highly interchangeable with others. In such circumstances, for direct licensing to fail CBS would have to be met with extraordinarily coherent resistance by publishers and composers. There is no basis in the record for the inference that such a coherent response is likely to occur.

We are left with the strong impression that CBS has exaggerated the risks involved in dropping its blanket license and sought a legal solution to what is essentially a business problem. The

20. See notes 3 and 5, *supra*.

21. See note 4, *supra*; CX 3.

risks which CBS claims are posed by direct licensing realistically exist only if CBS ignores its own axioms about "reasonably prudent" network managers (e. g., CBS Post-Trial Brief at 33, 36) and abruptly cancels its blanket license. There is little question that if CBS took such a course, its licensing efforts would produce temporary confusion and disarray. However, the taking of such a voluntary "risk" cannot itself act as a predicate for defendants' antitrust liability. Conversely, and more significant, CBS has considerable control over the degree of risk which a direct licensing attempt would involve. Assuming a reasonable period of preparation prior to the commencement of full-scale direct licensing, there are a number of steps CBS could take to assure the success of its efforts, particularly given its leverage with program packagers and, by extensions, with their publishing subsidiaries. For example, prior to cancellation of its blanket license, CBS might negotiate with the producers of its programs and films using "inside" music to secure favorable prices for licenses for music "in the can," and for music contained in new programs to be shown in the upcoming season; it could build up a large reservoir of music by requiring program packagers affiliated with major publishers to make their catalogs available for direct licensing in accordance with a fee schedule; it could negotiate with independent publishers for either "mini-blanket" licenses covering their catalogs or direct licenses using a fee schedule; it could send notices to all publishers of its intention to seek direct licenses for compositions in their catalogs; it could negotiate a per-program license with ASCAP and BMI whose fee would reflect the amount of music actually performed and failing that, it could bring proceedings under the consent decree.

[15] There is an astonishing lack of evidence that CBS considered such possibilities, or even the feasibility of direct licensing as a general proposition before commencing suit. The fact that it did not do so does not in itself defeat its claims, but it has rendered the nature of its proof at trial largely speculative. CBS' evidence was for the most part addressed to such abstract issues as "disinclination," and brought out through the generous use of hypothetical questions. However, it is proof of the threat of actual anticompetitive conduct, not possible "disinclination" which violates the antitrust laws. CBS might have obtained such proof by attempting to negotiate direct licenses. The proof which it chose to offer instead, as to the alleged fear or disinclination of copyright proprietors to engage in direct dealing, is not sufficient to establish an illegal restraint of trade. Such evidence does not prove that CBS needs, as it claims, the "signal" of a judgment in this suit to bring about a direct licensing system; it indicates rather that CBS has the power to give a clearly audible signal itself.

XII

Conclusions of Law

As stated early in this opinion, the pre-trial order specified the following issues:

"(i) Whether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint

(ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anticompetitive means."

The conclusion which inescapably follows from the evidence outlined in the body of the opinion is that CBS has failed to establish that defendants' conduct constitutes an actionable restraint and compels CBS to take a blanket license. The complaint alleges that defendants' acts and practices in licensing performance rights for network use constitute several distinct violations of the antitrust laws. Because CBS has failed to prove the factual predicate of

claims—the non-availability of alternatives to the blanket license—the complaint must be dismissed. We detail our conclusions of law below.

[16] 1. The claim that members and affiliates of ASCAP and BMI have illegally combined to eliminate price competition among themselves must be dismissed because CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them.

[17] 2. The claim that members and affiliates of ASCAP and BMI have combined to fix the price at which CBS must license performance rights by licensing those rights only in a package must be dismissed because CBS has failed to prove either that it purchased blanket licenses under compulsion or that the price it paid was fixed. To the contrary, the record establishes that CBS has always negotiated the price for its licenses with ASCAP and BMI.[22] Moreover, CBS has not established that the individual defendants are unwilling to sell performance rights on a direct licensing basis at a negotiated price for each license.

[18] 3. The claim that ASCAP and BMI have conditioned the licensing to CBS of music that it wishes to use upon the licensing of music it does not wish to use must be dismissed because CBS has failed to establish (a) that there were two separate and distinct "products" (i. e., groups of compositions, of which CBS wanted to purchase only one); (b) that CBS negotiated with ASCAP or BMI to license only the "wanted" compositions; and (c) that ASCAP and BMI refused to negotiate on that basis and had to coerce CBS to license the "unwanted" compositions as a condition of licensing the "wanted" compositions.[23]

22. We note, moreover, that contrary to CBS' claim that the blanket license fee is unrelated to the extent of the networks' use of music, the only evidence on the point indicates that the extent of CBS' music usage has always been a significant factor in negotiations for the fee paid on renewals of CBS' blanket license. (Tr. 3611, 3870–72).

23. In its post-trial reply brief CBS raises a new and somewhat puzzling variation of its claim that ASCAP and BMI are guilty of imposing unlawful tie-ins. CBS points out that ASCAP and BMI offer their members the services of monitoring and policing music uses and collection and distribution of royalties, and claims that neither organization offers such services to any user of music, such as CBS, "*unless* the user accepts a blanket license; and offers none to any member *unless* that member sells through the blanket license" (CBS Reply Brief at 14, emphasis in original). The claim is without merit. As to the first branch of the argument—that ASCAP and BMI condition the sale of their "auxiliary" services to CBS on its purchase of a blanket license, CBS cannot have been the victim of a tie-in because it has never purchased such services; only members and affiliates of ASCAP and BMI have done so. If CBS' claim is construed more charitably to be that ASCAP and BMI would refuse to sell such services to CBS (which CBS could use to induce copyright proprietors to engage in direct dealing) *unless* CBS also purchased a blanket license, the claim still fails as a matter of law: CBS has never sought to purchase "only" services, and there is no evidence that if it did so ASCAP and BMI would condition their sale on the purchase of a license CBS does not want.

The claim that ASCAP and BMI condition the sale to their members and affiliates of their services as licensing agents on their "purchase" (through administrative charges against royalty distributions) of auxiliary services such as monitoring is also without merit. CBS has no standing to assert such a claim because the member or affiliate, rather than CBS, is the alleged victim of the tie. Putting aside the conceptual difficulties presented by CBS' position, there is no evidence that ASCAP and BMI have refused or would refuse to monitor uses and collect royalties on behalf of members and affiliates who engaged in direct negotiations and wished to have the convenience which a central agency offers. To the contrary, there is every reason to believe that ASCAP and BMI would want to preserve this branch of their business even if they were forced to forego the issuance of blanket licenses. In addition, there is no evidence that if necessary copyright proprietors would not readily forego such services to have their compositions performed on CBS. Copyright proprietors certainly do not indispensably need ASCAP or BMI to perform the function of col-

[19] 4. The claim that ASCAP members and BMI affiliates are guilty of a group boycott by forming the ASCAP and BMI music pools and authorizing their licensing agents to license only on terms that foreclose CBS from dealing directly with copyright owners must be dismissed because CBS has failed to prove that the licensing authority of ASCAP and BMI is limited to such terms, is exclusive in fact or that copyright owners have refused or would refuse to deal with CBS directly on an individual basis.

[20] 5. The claim that ASCAP members and BMI affiliates are guilty of copyright misuse must be dismissed because CBS has failed to establish that the members or affiliates of ASCAP or BMI have refused or would refuse to license their compositions on a direct licensing basis, or otherwise used their collective leverage to compel CBS to license rights to music which it did not wish to license.

[21, 22] 6. The claim that defendants are guilty of monopolization, both attempted and achieved, must be dismissed. The offense of monopolization consists of two elements: possession of monopoly power in the relevant market and willful acquisition or maintenance of that power as distinct from growth as a consequence of a superior product or historical accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). Attempted monopolization is established by a showing of specific intent to monopolize with a "dangerous probability" of succeeding. *Lorain Journal Co. v. United States*, 342 U.S. 143, 153, 72 S.Ct. 181, 96 L.Ed. 162 (1951); *Swift & Co. v. United States*, 196 U.S. 375, 396, 25 S.Ct. 276, 49 L.Ed. 518 (1905). CBS has failed to prove these elements.

[23] To begin with, we disagree with CBS' argument that the relevant market is the market for BMI and ASCAP blanket licenses. The proposition is based on a factual premise which is rebutted by the evidence: that blanket licenses are the sole method for securing performance rights. Manifestly, ASCAP and BMI are not the sole source of the performance rights CBS needs; they are merely the sole source of the blanket licenses which CBS does not want. A market whose only product CBS does not want to purchase cannot by definition, be a relevant market, and the monopolization of a market in which CBS does not want to buy (and in which of course, it need not buy) cannot injure it.

[24] The relevant market is the market for performance rights to compositions suitable for television network use. The classic test for determining the relevant market in suits brought under § 2 of the Sherman Act is whether products are "reasonably interchangeable by consumers for the same purposes." *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 395, 76 S.Ct. 994, 1007, 100 L.Ed. 1264 (1956). Products are said to be interchangeable when they can be used for the same purpose, and when a purchaser is willing to substitute one for the other. *United States v. Cl[illegible] Power & Co.*, 246 F. Supp. 464, 46[illegible] E.D.N.Y.1965, Mishler, J.). It is evident (indeed it is CBS' premise in this suit) that a bundle of direct licenses for network performances, acquired on an individual transaction basis, is interchangeable with a blanket license permitting the use of exactly the

lecting their royalties; the producer using the music would simply remit payment to the proprietor, or to Harry Fox or a similar organization. Nor does it appear that however convenient the present arrangement may be, the producer is indispensably dependent on ASCAP and BMI to monitor possible infringements by a large television network which performs music before millions of viewers; certainly CBS cannot be expected to argue the contrary.

same music. Moreover, because the evidence establishes that musical compositions are fungible, a virtually unlimited number of *combinations* of compositions (i. e., bundles of licenses negotiated on a direct basis) sufficient for CBS' music needs would be readily interchangeable with a blanket license. Accordingly, the relevant market includes *all* sellers of performance licenses for network use, including ASCAP and BMI, as sellers of blanket licenses, and individual copyright proprietors, as sellers of "direct" licenses.

[25] CBS has not proven that ASCAP or BMI possesses, or has attempted to achieve monopoly power in the market for performance rights for network use. In *United States v. Grinnell Corp., supra*, 384 U.S. at 571, 86 S.Ct. at 1704, and *United States v. E. I. duPont de Nemours & Co., supra*, 351 U.S. at 391, 76 S.Ct. at 1005, the court defined "monopoly power" as the "power to control prices or exclude competition." CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses. We have found that copyright proprietors would deal readily on a price basis; certainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place. Indeed, as noted earlier, the power of ASCAP and BMI to control the price even of their own blanket or per-program licenses is sharply curtailed under the decrees.

Nor does ASCAP or BMI have the power to exclude competition: there is a high degree of interchangeability among compositions, and performance rights to any given type of composition are available from a number of sources if CBS chooses to tap them. In addition to the choice of a blanket license or a per-program license from ASCAP or BMI for any given type or group of compositions, any composition (or combination of compositions) or its practical equivalent could be licensed from several individual copyright proprietors.

Finally, there is no substantial evidence that ASCAP and BMI have attempted to monopolize the market for performance rights for network use. Although at present they are the sole suppliers of CBS' music needs, such a state of affairs has resulted not from any violation of the antitrust laws but because CBS has, since the advent of television, found it convenient to secure a blanket license which, by definition, can be practicably obtained only through a collective licensing agent. The fact that CBS now wishes to change its long standing business practices does not, without more, convert defendants into monopolists.

CBS has failed to prove that any activities of ASCAP and BMI and their members and affiliates threaten it "with loss or damage by reason of any violation of the antitrust laws" within the meaning of § 16 of the Clayton Act. Even assuming, contrary to the evidence, that CBS has established the possibility of an impending violation on the part of some individual defendants, it has not established the threat of loss or damage sufficiently to warrant the grant of an injunction against the issuance of blanket licenses to any television network, or establishing its proposed "per-use" system.

The foregoing constitutes our findings of fact and conclusions of law. The complaint is dismissed.

It is so ordered.

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